80-1015

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ASCHER,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether mere allegations of wrong doing in a complaint, unsubstantiated and refuted of record, can support a denial of a license to practice law?

2. Can the subjective conclusions "inexcusable" conduct, and "unconscionable" procedures, be applied subjectively to deprive a qualified applicant to a license to practice law, without evidence of immoral or illegal conduct to support them?

3. When all of the evidence produced in support of an application for a license to practice law, comes from the applicant, which shows no immoral or illegal act done; and, no contradictory evidence is produced to show such illegality or immorality; can the State deprive a qualified applicant of a license to practice law without violating the due process clause of the Constitution, depriving him of his property arbitrarily and capriciously?

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I

It is a denial of property without due process of law, to deny a qualified person a license to practice law, who has not violated any moral precept, a canon of ethics, a code of professional responsibility, a statute, an ordinance or a rule with the force of law.

II

It is a denial of property without due process of law to deny a qualified person, a license to practice law, when the record is devoid of evidence to prove that that person committed any wrongdoing whatever.

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III

It is a denial of property without due process of law to deprive a qualified person of a license by subjective standards of "inexcusable" conduct, and, of the following "unconscionable" procedures, without evidence of any kind to relate to that generic conduct or those unspecified procedures.

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The Petitioner, WALTER A. ASCHER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Supreme Court.

OPINION BELOW

The opinion of the Supreme Court appears in the Appendix, infra, (pp. 1). It is published in 81 Ill 2d 473; 411 NE 2d 1.

JURISDICTION

The order of the Supreme Court of Illinois was entered on May 22, 1980. Rehearing was denied on September 26, 1980. (id.) Jurisdiction of this Court is invoked pursuant to 28USCA 1257 (3).

STATEMENT OF THE CASE

A. BACKROUND

WALTER A. ASCHER is a real estate broker licensed to practice in Illinois. (No. 75-67953) (R.46) He does so through the medium of a wholly owned corporation called VILLAGE CENTER REALTY, INCORPORATED. (R. 46 At premises owned and operated by the Corporation, he conducts a real estate business and an income tax service. (R. 46) He is an enrolled agent with the Internal Revenue Service. (R. 47)

In April, 1979, he was notified that he had satisfactorily passed the bar examination given by the Board of Law Examiners, (Ill. Sup. Ct. Rule 708, 58 Ill 2d) and, was eligible to be certified to the Court for admission to the Bar. (Ex. 5; Rule 704, 58 Ill 2d) When he appeared for his admitting oath of office, he was told that his certificate of character and fitness had been withdrawn by the Committee which issued it. (R. 9)

The Committee withdrew certification, it subsequently said, because of the allegations of a complaint filed in a civil action. (R. 12) The plaintiff's attorney said he had sent a copy of the complaint to the Committee. (R.9) Without more, the certificate was withdrawn. Preliminarily, this Petitioner then delivered every document and paper in his possession to a member of that Committee. He explained in detail the transaction from start to finish. He proved no wrong and no loss had occurred. Nevertheless, a hearing

before the full Committee was held. It was an "inquiry", (R. 358) not a hearing, and, therefore, a cross examination was denied Petitioner. (R. 358)

B. THE ACTUAL TRANSACTION

On April 18, 1978, Thomas Brewer, Sr., as president of Alloy Piping, Incorporated signed a contract to purchase 5.5 acres of land in Wood Dale, Illinois. ASCHER signed the contract as Seller, describing himself as "beneficiary of Bank of Lyons Trust Number 1737". (Ex. A. To Compl.) On July 6, 1979 the transaction was closed, and title was transferred to Alloy's Trust, the Bank of Elk Grove Village. (Ex. H to Compl.) A corrective deed, described as such on its face, was subsequently prepared and filed of record on September 7, 1979. (Ex. J., to Compl.) Notwithstanding the latter deed, Brewer entered into possession of the 5.5. acres on July 6, 1979, and has used, enjoyed and improved them without

hindrance from that date to this. (R. 213)

On July 6, 1978 there was, and had been since May 26, 1978, a mortgage on the property in the amount of $75,000.00. It was recorded on the latter date as document No. R 78-46214, Du Page County, Illinois. (Ex. D, to Compl.) BREWER was told of the existence of this mortgage and of the plans to remove to another piece of property. (R. 126)

Although BREWER denied that knowledge (R. 341) these facts are undisputed: a) The recorded mortgage was notice to the world; b)BREWER in a September, 1979 letter to ASCHER referred to the "clear title" promised on July 6; (Ex. 27, R. 359) and, c) BREWER continued his use, enjoyment, and development of the property during the six month period that this mortgage remained of record. (R. 213) On January 9, 1979 the mortgage was removed, at no cost or inconvenience to BREWER.

C. THE UNFOUNDED COMPLAINT

During the waiting period (July-January) for the removal of the mortgage, BREWER filed an eleven (11) page complaint, with eleven (11) exhibits, in the Chancery Division of the Circuit Court of Du Page County. (Ex. A, R. 9) It prayed for the deposit of the $75,000.00 mortgage money in a fund pending litigation; (Par. A. P. 10); and for a temporary injunction restraining the transfer of the purchase price. (Par. 5, p. 11) No motion was ever filed to effect either of those emergency matters. (Mem. to Petition p.11)

Subsequently, the matter was transferred, on petitioner's motion, to the law side of the Court, as a damage action, where it presently languishes. An offer to settle for $6,000.00 was made by BREWER, accepted by the Petitioner, (ex. Pet. for Rehearing p. 6) BREWER then reneged on his offer.

BREWER'S attorney sent a copy of this Complaint to the Supreme Court's Committee on

Character and Fitness. (Petition Pg. 4) It was on the basis of the allegations of this complaint, that Petitioner was denied a certificate of character and fitness. (Findings of Fact. 9 to 21) They were also the basis for the Court's refusal to license the petitioner. (81 Ill 2d at 487-489)

Disregarding its prolixity and its digressions, the complaint makes four substantial charges against this petitioner. These are:

1. ASCHER was the agent and the fiduciary of BREWER. (Pars. 4-12)

2. ASCHER signed a contract to sell property to which he had no title. (Par. 12)

3. ASCHER "forged" Kaczmarek's name to documents. (Par. 27 A. C.)

4. In eight specific instances, ASCHER acted in a "wilful, wanton, malicious and fraudulent" manner. (Pars. 16, 19, 22, 26 (two charges), 30, 32, and 34) None of these has

substance. None has been proved. All have been refuted or satisfactorily explained of record. No wrong has been done, ethically or legally.

1. ASCHER was not BREWER'S agent in the sale, because a) he signed the contract as Seller in his own name; (Ex. A. to Compl.) The complaint admits that he did so; (Par. 12) and, further alleges that ASCHER was Kaczmarek's agent in this sale; (Count III, Par. 3) BREWER admitted he paid no fees, commissions or other inducement to ASCHER in this sale. (R. 346)

The charge of "fiduciary" in the complaint springs from the allegation that ASCHER was BREWER'S accountant. (Par. 8) ASCHER denied that charge, and then, affirmatively averred that he had prepared Alloy's 1975, 1976 and 1977 tax returns from figures supplied by BREWER. (Am. Ans. par. 8) This is not denied by reply. It is therefore, admitted. (Ill Rev. Stat. 1977 ch 110, Par. 40(2) It was stated for the record at the hearing by ASCHER (R. 111), and,

not refuted by BREWER. who also testified. It has no current substance.

2. ASCHER signed to sell property he didn't own. He did, but not only was he an equitable owner, (R 117-118) but in Illinois that is not required. The seller need only be able and willing to transfer the property on the closing date in Illinois. (Limpinen v. Hicks, 73 Ill App 3d 376, 378-79) ASCHER delivered on the closing date.

3. Petitioner was guilty of "forgery". The charge was made in ignorance of the legal significance of the term. Forgery is a crime of deception. Its essence is fraud. It is postulated on the lack of authority to sign another's name. (Ill Rev. Stat. 1977, Ch. 38, Par. 17-3(a) (1)). ASCHER said he had authority to sign Kaczmarek's name. (R. 158) He produced a signed Power of Attorney. (Ex. 11) Kaczmarek testified and said that ASCHER before, then and in the future has authority to sign Kaczmarek's

name. (R. 262, 264)

4. The words, wilful, wanton, malicious, and fraudulent are patently fatuous. None is related to substance. None is provable. These are:

i. The concealment of an existent contract to sell this same property. (Par. 6) That contract died in a failure of conditions precedent, and, on April 18, 1978, the earnest money had been returned and accepted. (Gr. Ex. 4)

ii. Petitioner deposited the proceeds of the sale "in his own account in his own name", (Par. 32) ASCHER has answered, (Par. 32) and has protested wherever he can be heard (Mem. p. 11) that no one can wilfully, wantonly, maliciously and fraudulently, or singly or in any combination deposit money in his own account in his own name. He can obtain money by those means, but cannot deposit it by those means.

iii. Petitioner had concealed the details of the prior sale of the property from

BREWER, a subsequent purchaser. Kaczmarek, petitioner's associate, (R. 92) contracted to buy this property on December 16, 1977. (Exs. 2 to 7) The purchase price in that sale, and the details of same, were none of BREWER'S business. (R. 164) This was an arms length sale. BREWER got what he purchased free and clear. He enjoys it free and clear. It is worth more than double its purchase price. (R. 165,)

iv. Petitioner withheld the existence of the $75,000.00 mortgage from BREWER. (Pars. 22, 26) In paragraph 25, of his complaint, BREWER said this mortgage was recorded in the County Recorders Office, as document R78-46214. That is notice to the world, of whom BREWER is a part. He then pleads the alteration of the first page of a title commitment to eliminate reference to that mortgage. (Par. 24) But, that page is part of a four (4) page document, and the mortgage is detailed in those pages.(R.131) BREWER, by letter in September, 1979 refers to the "clear title"

promised on July 6. This mortgage was the only "impediment to "clear title", so BREWER tacitly says he was aware of that mortgage on July 6. Finally, the mortgage never was, and is not now, an impediment to BREWER'S title or to his enjoyment of the property. The allegation does and cannot reflect adversely upon the petitioner's character, because it lacks evidentiary substance.

v. The petitioner "in preparing the warranty deed" omitted stating it was subject to a mortgage. This fuzzy language may refer to a need to refer to a mortgage in a deed. There is no such need. There is no provision for a reference to a mortgage on a deed. (Ill. Ex. C to Compl.) In any event, it was not concealed (see, iv. above)

vi. This charge relates exclusively to the prior sale of the property from Freston to Kaczmarek. As noted above, No. iii, p. 17) this

sale was none of BREWER'S business. That contract was entered into four months previously. It was consummated according to its terms. BREWER'S contract was consummated according to its terms. Nothing of the first sale was relevant to BREWER or his concern. Thus, the wilful, wanton, malicious and fraudulent words here fail for want of a reference to BREWER.

D. THE PEREPHERAL CHARGES

1. This petitioner had misstated a fact, in one of the forms filed with the Committee. He answered a supplementary questionaire, updating certain answers on his basic questionaire requiring the details of the civil litigation in which he was involved. (See, Exs. 65 and 66) In April, 1979 in an update he answered relative to civil litigation, "no change". This lawsuit had been filed in November, 1978. Thus, the answer was wrong.

The Committee and the Court, by labeling, by intensifying and by horror has trans-

substanstiated this civil complaint, into a complaint, into a compendium of evil. By doing so, it has made the concealment of it equivalent of a felony. (81 Ill 2d at 499) The citation in support of its condemnation were concealment of felonies.

Calmer minds could have accepted the good faith explanation of the petitioner. (R .172) Or, at least kept the failure to disclose the pending civil litigation, to the level of civil litigation. ASCHER had previously listed some eight (8) civil law suits. This one was not essentially different, and ASCHER had testified that after being deposed in that lawsuit, he thought it had been satisfactorily resolved. (R. 171) In any event, he told the Committee that both he and his wife, the preparer, thought it had been reported earlier on another form. (R. 169)

2. The Committee (Findings of Fact) and the Court (81 Ill 2d at 499, 501) had a

preoccupation with the petitioner practicing law without a license. The fact is there is not one iota, not one scintilla, no evidence of any kind, that this petitioner gave legal advice, represented a client, or held himself out to anyone at anytime, that he was a lawyer. He had created a vehicle for that purpose and equipped it, in anticipation of his right to practice law. (R.179) But, since he was within minutes of being admitted to practice, preparation for it was proper and correct, but that is not the same as doing it. Yet, the brush was used to tar him, wrongfully and without factual support.

ARGUMENT

I

THIS PETITIONER WAS DENIED DUE PROCESS OF LAW IN THE STATE COURT'S DENIAL OF A LICENSE TO PRACTICE LAW BY; A) FAILING TO SUPPORT THAT DENIAL WITH EVIDENCE OF HIS LACK OF GOOD MORAL CHARACTER; B) BY FAILING TO FIND A VIOLATION OF MORALS OR OF LAW, AND SUBSTITUTING FOR THAT FAILURE, THE SUBJECTIVE CONCEPTS OF "INEXCUSABLE CONDUCT"; AND, C) IN DENYING HIM THE RIGHT TO CROSS EXAMINATION OF AN ADVERSE WITNESS.

The Illinois Supreme Court has a process of a combination of Court rules 708 and 709, (73 Ill 2d) which produces procedures of contesting its Committee's denial of a Certificate of Character and Fitness. This is called an "inquiry". (R. 358) The denial of due process inherent in that designation is that the petitioner is denied the right of cross examination; (R. 358) and therefore, a denial of due process. Willner v. Committee on Character, 373 US 96, 103.

However, a hearing in the sense of the production of evidence was available and used. The hearing before the Committee began promptly at 9:00 a.m. At the outset, the Applicant acknowledged his burden to show he has the proper character and fitness to practice law. (A 16) This, of course, was his duty, (In re Martin-Trigona, 55 Ill 2d 301, 305) In meeting that obligation, the Applicant testified for more than four (4) hours. (R. 42-252) All of the exhibits are documents he had filed with the

Board of Bar Examiners, or had furnished to the Committee, or introduced into the hearing. The sole exception was the Complaint in ALLOY PIPING v. ASCHER et al, (A. 9) which had been forwarded to the Committee by the attorney (Stephen J. Culliton) for the Plaintiff. (R. 6) It was the springboard for the hearing and the recommendation.

The transcript of the hearing consisted of 402 pages. The Applicant and his witnesses testified for 325 of them. (R. 3) Four of the six witnesses were the Applicant and his corroborating witnesses. The Plaintiff (BREWER SR.) testified in opposition.(R. 324-365) An attorney (Heidecke) injected an irrelevant incident, which was intended to be derogatory of the Applicant, (R. 365-400) but not found to be so. (F. 35, pp. 9-10)

As stated in his petition, (Par. 2A), Walter Ascher, the Applicant, has neither been charged with nor found in violation of a moral

precept, a statute, an ordinance, a rule with the force of law, a regulation, a canon of ethics or of professional responsibility.

Instead, the Committee concluded that:

> "The representation of Trust No. 1737" which was not the owner, "was improper". (No. 2, pg. 10)
>
> The Applicant (a) signing Kaczmarek's name and, (b) "knowingly allowing Darienzo to sign Kaczmarek's signatures was improper". (Nos. 3 and 4, id.)
>
> "The procedure followed (in these two sales) are unconscionable" and, "indicate to the Committee a serious defect in the character of the Applicant." This, it concluded, made him "unfit". (No. 5 pp. 10-11)

None of these conclusions are supported by the evidence.

Due process applies to the administrative process, (Schware v. Board of Bar Examiners, 353 US 232, 238) and, particularly "when there is no basis for their finding that he fails to meet those standards, or where their action is invidiously discriminating" (id., at 239) "It

is a violation of due process to convict and punish a man without evidence of his guilt." (Thompson v. City of Louisville, 362 US 199, 203, See too, Vajtauer v. Council of Immigration, 273 US 103, 107. There the Court also pointed out that that doctrine excludes erroneous decisions and wrongful admission of irrelevant evidence. The Applicant's argument here excludes them, also. The error here was to ignore the evidence in support of the Applicant, and, to make findings unsupported by evidence. "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to the crucial element of the offense charged...violates due process." (quoted in Vachon v. New Hampshire, 414 US 478, 480)

The issue here is much similar to that in Konigsberg v. State Bar, 353 US 252. There Konigsberg's position was characterized by this Court: (at 256)

> He asserted that he had affirmatively proved his good moral character and that there was no legal basis for finding that he was morally unfit to practice law. He insisted that in determining whether he was qualified the Committee had to comply with due process of law and cited as supporting his position Wieman v. Updegraff, 344 US 183, and Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, where this Court condemned arbitrary findings as offensive to due process. Since Konigsberg challenged the sufficiency of the evidence in his petition for review, it seems clear that the State Supreme Court examined the entire record of the hearings before the Bar Examiners and must have been aware of the constitutional arguments made by Konigsberg during the hearings and the authorities relied on to support these arguments.

So, here, the petitioner and his witnesses testified to what was done openly; that more than value was delivered; that the Purchaser got what he bought, used and enjoyed it from the moment he bought to this day; and,

that the documents used to get it for him are effective and of record at this moment.

Each of the proofs necessary to support the propriety of what ASCHER had done is supported by a document having a legal, and to the Committee, a moral import. Nothing which has transpired, or been written by the Committee reflects that a member of the Committee has read them. The chronology and the exhibits were filed in the Court below. (Exs. I to XXXV) They were ignored.

Although procedural due process preempts the attention of the Courts in most cases, the end product of that procedure is the right to be judged upon the evidence produced. In re Oliver, 333 US 257 at 273, 275. Lacking that end product the gag of Roy Bean (The law west of the Pecos) to give the defendant "a fair trial before we hang him", is no gag.

Due process must be accorded an attorney in disbarment proceedings. However, it may

fail for want of an agreement on the moral quality of the attorney's conduct. In re Ruffalo, 390 US 544, at 556 (concurring opinion)

Due process requires that the findings of an administrative body be supported by substantial evidence. Aberdeen & Rockfish R. R. v. United States, 565 F2d 327, 334. In the case at bar, there is no evidence which supports the conclusion that this Applicant lacks "good moral character", and none that he is "unfit" to practice law. The evidence produced by this Applicant supports both requirements of Rule 708 (b) of the rules of this Court.

This Court here, may write exactly what it wrote for Schware, with the same degree of truth. "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." Schware v. Board of Bar Examiners, 353 US at 246-47. ASCHER is morally fit to practice law.

CONCLUSION

The conclusion of "inexcusable" and "unconscionable" are patently subjective conclusions. Whether the other party chooses to "excuse", is just as constitutional as an ordinance predicated upon whether a policeman is "annoyed". Coates v. City of Cincinnati, 402 US 611, 614. Nothing, by nature is more subjective than "conscience". It is a sister's standard of condemnation of brothers' who earn money in ways the former disapprove; for example, working on the Sabbath. But, the real issue here is not the subjective nature of the Committee's and Court's disapproval. The Constitutional issue here is that neither body had evidence that this petitioner did anything immoral, unethical or illegal. On the contrary, this petitioner proved that he has the character and the fitness to be licensed to practice law.

> "In this case we are compelled to conclude there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character. . . Without some reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's backround and character as unfit to practice law."
> (353 US at 273)

So, here, it is equally unjust to ASCHER to have his character besmirched, by a total lack of evidence produced. No wrong was done. No hurt inflicted. No one was bested. No law was violated. No canon of ethics or moral command transgressed. The doctrine of Schware and Konigsberg should be renewed.

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Appendices

(No. MR 2391.—Petition denied.)

In re WALTER A. ASCHER, Petitioner.

Opinion filed May 22, 1980.—Rehearing denied September 26, 1980.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

The issue here is whether Walter A. Ascher is "of good moral character and general fitness to practice law" as required by our rules (73 Ill. 2d R. 701(a)) for admission to the bar of Illinois. The Committee on Character and Fitness for the Second Judicial District (Committee) reported that it could not so certify (73 Ill. 2d R. 708(c)). Ascher now petitions us to admit him to practice (73 Ill. 2d R. 708(a)), asserting the Committee's action to be arbitrary and unwarranted.

Petitioner passed the examination conducted by the State Board of Law Examiners in February 1979. On April 16, petitioner, as required by the Board, filed its form entitled "Additional Questionnaire and Statement of Applicant" supplementing the original questionnaire filed in November 1977 containing his original responses to questions concerning character, fitness and personal history. In the additional questionnaire, petitioner was asked whether he had "ever been a party (either plaintiff or defendant) to or otherwise involved in any action or legal proceeding either civil or criminal or quasi-criminal, including any proceedings in a juvenile court?" He responded: "No change." The fact was, however, that on the preceding November 2, 1978, a civil suit, Alloy Piping, Inc. v. Ascher *et al.*, had been filed in the circuit court of

Du Page County, naming petitioner as a defendant. The allegations in that complaint, which was still pending, made serious charges of misconduct against him. It is largely the failure to disclose the existence of that lawsuit and the Committee's findings regarding the conduct of defendant upon which the suit was predicated which prompted the Committee's refusal to certify petitioner.

The plaintiff, Alloy Piping, Inc. (Alloy) alleged in count I of its complaint that petitioner occupied a fiduciary relationship to it since he had served as its tax accountant for three years and as its agent-broker for the purchase of real estate. Alloy also alleged that petitioner represented that he would act as Alloy's "agent-broker" in connection with the contemplated purchase of another tract of land, and that petitioner "controlled" this tract. Relying on those representations Alloy on April 18, 1978, signed a contract for the purchase of the property at a price of $120,000. The contract described the seller as "Bank of Lyons Trust No. 1737," and was signed by petitioner "as beneficiary of Bank of Lyons Trust No. 1737." Pursuant thereto, Alloy tendered to petitioner a check for $12,000 made payable to petitioner's real estate agency, as escrowee. It was additionally alleged that neither petitioner nor Trust No. 1737 held an interest in that real estate on April 18; that petitioner at that time knew that there existed a contract dated April 1 for the sale of the same land by another person, as beneficiary under Trust No. 1737, Bank of Lyons, for a price of $109,000; and that petitioner wilfully, maliciously and fraudulently withheld from Alloy his knowledge of the preexisting contract.

It was further alleged that petitioner violated his fiduciary duties to Alloy by failing to disclose that he, after learning of Alloy's interest, arranged for the sale of this real estate by the actual owners, Robert and Dorothy Freston, to Winfried and Mildred Kaczmarek for $100,000

pursuant to an agreement between the Kaczmareks and petitioner to share the profit from the subsequent sale to Alloy at the higher price; and that petitioner received a real estate commission on the Freston-Kaczmarek sale. It was further alleged in reference to the Freston-Kaczmarek sale that petitioner knew a $75,000 mortgage was given to the Frestons by the Kaczmareks and recorded, but that the existence of this mortgage was fraudulently withheld from Alloy.

It was also alleged that petitioner tendered to Alloy a Chicago Title and Trust Company commitment for title insurance in the amount of $120,000 which gave no indication of the existence of a mortgage on the covered property. The complaint also charged that the original commitment for title insurance, which was in petitioner's possession, was in the amount of $100,000 and noted the existence of the $75,000 mortgage. It was additionally asserted that petitioner not only fraudulently withheld this material information from Alloy, but had also altered the copy of the title commitment policy tendered to Alloy by deleting the reference to the mortgage and changing the amount of the policy from $100,000 to $120,000. It was further alleged that at or prior to the time of closing, petitioner forged the signatures of Winfried and Mildred Kaczmarek to the affidavit of title, warranty deed and closing statement, and that the warranty deed prepared by petitioner made no mention of the mortgage. In addition the complaint alleged that petitioner had fraudulently deposited a cashier's check for $106,952.76, made payable to the Bank of Lyons Trust No. 1737 and representing the amount due the sellers at closing, in his own account in his own name at the Elmhurst National Bank. Also alleged was Alloy's repeated demand upon petitioner for the clear title which Alloy had learned it did not have. Temporary injunctive relief, actual and punitive damages and a declaration holding petitioner in contempt of court for

the unauthorized practice of law were prayed.

Counts II and III of the complaint were directed toward Village Center Realty, Inc., and the Kaczmareks, and the entire complaint was verified. On December 22, an apparently unverified answer to the complaint was filed. Petitioner signed his attorney's name but with his own initials in parentheses. During oral argument counsel for petitioner submitted a motion, which we now allow, to supplement the record with a copy of a motion for summary judgment filed on behalf of petitioner and denied by the trial court.

Upon learning that this undisclosed suit was pending, and had been pending against petitioner at the time he completed the additional questionnaire, the Committee notified him and conducted a hearing during which some six witnesses, including petitioner, testified and numerous exhibits were admitted. It will be necessary to relate that evidence in some detail.

Following his 1962 graduation from high school, petitioner was employed by various companies for varying periods of time. He also attended several educational institutions on a part-time or evening basis, receiving an A.B. degree from Northeastern Illinois University in 1973. He commenced his law work on a part-time evening-class basis at John Marshall Law School in 1970. In 1975 he enrolled at Lewis University College of Law as a full-time student and graduated in January 1978. Since 1974 he has conducted an accounting business under the name of Ascher Accounting and has been a licensed real estate broker and agent doing business as Village Center Realty. He is also a licensed insurance agent and broker and an "enrolled agent" with the Internal Revenue Service. The "Certificate of Ownership of Business Firm" filed in the office of the county clerk of Du Page County under "An Act in relation to the use of an assumed name in the conduct or transaction of business in this State" (Ill. Rev.

Stat. 1977, ch. 96, pars. 4 through 8a) lists Walter Ascher as "owner of" Addison Legal Services, and John A. Darianzo as "(Transacting Business)". The business card for Addison Legal Services lists Walter A. Ascher as "business manager." "Addison Legal Services" was apparently adopted in November 1978 by Ascher and Darianzo as a business name and discontinued in May of 1979 when a new lawyer was informed by the Illinois State Bar Association that use of the name was improper.

During its existence Addison Legal Services shared with one of the two Village Center Realty offices and with Ascher Accounting approximately one-third of a building in Addison, owned by petitioner, the balance of which was rented to other small businesses. On the left front of that building above the windows in large letters appear the words

ACCOUNTING & TAX SERVICE VILLAGE CENTER REALTY
LAW OFFICES
530-1020

In addition to the larger signs, there is a third sign, smaller and slightly below the other two, upon which appear the words "Cunningham and Wood, Attorneys at Law." There is a doorway between the large signs and a second doorway to the right of the realty sign. A diagram of the interior seems to indicate a partition separating the law office from the accounting and real estate offices with communicating doors between them. Apparently a single telephone number served all three. The Addison Legal Services stationery contained the name of John Darianzo as "of counsel." Cunningham and Wood are two attorneys admitted to practice in 1978. They apparently practiced in Aurora but were joining Addison Legal Services when Darianzo moved to Texas. Although their names appear on the outside of the building in a photograph taken at some undisclosed date, it is not at all clear that either Cunningham or Wood ever practiced at that address or that either

was a part of Addison Legal Services during the period here involved. Their names do not appear on the stationery.

With reference to the Freston-Ascher-Kaczmarek-Alloy real estate transaction which culminated in the undisclosed lawsuit, petitioner testified that Mr. and Mrs. Freston had moved to Florida and wanted to sell a tract of real estate known as Lot 4, and that on September 16, 1977, Winfried Kaczmarek entered into a contract with the Frestons to buy Lot 4. (The September 16, 1977, "contract" in the record, however, is one on which only one signature appears: Winfried Kaczmarek. The record does contain a contract bearing the signatures of Mr. and Mrs. Freston and Winfried Kaczmarek for the sale of Lot 4 to Kaczmarek for $100,000. That contract is dated April 22, 1978, which, we note, was four days after petitioner had contracted to sell Lot 4 to Alloy for $120,000.)

Petitioner further testified that in December Mr. Freston suggested they change to an "installment sale" secured by a mortgage on Lot 4 to the Frestons; that Mr. Kaczmarek accepted the new terms which were "$25,000 down and $25,000 over a three-year period in annual installments" with a $75,000 mortgage on Lot 4 as security; that petitioner told Mr. Freston that petitioner "was interested in going with Mr. Kaczmarek into Lot 4 because of our subdivision we were trying to make," and that it might be necessary to transfer the mortgage to another piece of property, to which he said Mr. Freston agreed. Petitioner also testified that he and Kaczmarek were unsuccessful in acquiring other property for the subdivision and decided in January 1978 to sell Lot 4; that in April Thomas Brewer, Sr., one of Alloy Piping's owners, came to the office to have the corporate income tax return prepared; that he was looking for industrial property, and petitioner succeeded in arranging for him the mid-April purchase of approximately two acres adjacent to Lot 4;

that sale was closed in "our office" with the seller and his attorney and Brewer and petitioner present. According to petitioner, Brewer and he then entered into a contract for the purchase by Brewer of Lot 4, petitioner signing that contract as beneficiary of Bank of Lyons Trust No. 1737 although the trust had never had, and never acquired, title to Lot 4. The Freston-Kaczmarek sale of Lot 4 was closed May 22. The closing statement shows a total purchase price of $100,000, with a purchase-money mortgage from the Kaczmareks to the Frestons for $75,000. A $10,000 real estate commission was payable to petitioner's firm. The Kaczmareks' names were signed to the closing statement by Darianzo.

On July 6, petitioner testified, the Ascher-Alloy sale of Lot 4 was closed. Petitioner said Brewer had "been made aware that the property was encumbered with a $75,000 mortgage"; that Brewer was concerned about his title and was told by petitioner that all incumbrances would be removed "relatively soon"; that Brewer wanted to know "what his title opinion was going to look like," and that petitioner took an old title opinion from the Kaczmarek-Preston closing, masked out with a piece of paper the reference to the mortgage on page 1 and ran it through a copier, changed the amount of insurance from $100,000 to $120,000 and showed it to Brewer as illustrating the policy which would be issued to Brewer. Petitioner testified that he eliminated the mortgage from the first page, but that it was also referred to on the later pages; he also stated that he, Brewer and Darianzo were present when this was done; that Brewer was very much concerned about the mortgage and that petitioner promised to clear the title, but that there was no written agreement to that effect. Petitioner stated he prepared the closing statement, affidavit of title, and the deed; that he felt qualified to do so because he had a 50/50 interest with Kaczmarek. He had the executed deed sent to the recorder's office, and it

reached that office. He left for Europe at the end of July with his family and stayed five weeks. When he returned, the Brewers were upset. They had not received the deed, had employed counsel, gone to the title company office, found the Kaczmareks still had title, and the mortgage was still on the land, even though they had paid the full purchase price to petitioner on July 6. Petitioner testified he was ready to pay off the mortgage in the fall, but that Mr. Freston did not want the money until the following January, and that it was paid and the mortgage released in January 1979. Petitioner also testified that at some time after the filing of the Alloy lawsuit in November 1978 he prepared a written power of attorney from the Kaczmareks to him. That power of attorney pertained to the Lot 4 property, indicated petitioner had an interest in the property, and gave him blanket authority to act for the Kaczmareks. That document was backdated to November 25, 1977, and was acknowledged before a notary on April 9, 1979.

Petitioner also testified that he did not list the pending Alloy lawsuit in his additional questionnaire dated April 16, 1979, because he thought it was listed in his application to take the bar examination for the third time, which he filed in November 1978. Those applications, however, contained no questions regarding court actions involving applicants. Only the character and fitness questionnaire inquired as to court actions, and petitioner had filed it in November 1977, a year before the lawsuit in question had been initiated.

Under questioning by Committee members petitioner stated his position regarding his fiduciary relationship with Alloy and its owners was that such relationship embraced only the tax return. In closing the sale between Kaczmareks and Alloy, petitioner stated Brewer was not represented but closed the transaction "on his own"; that petitioner signed the Kaczmareks' names to the closing

statement although he "was not sure" Brewer knew that. "John Darianzo was there representing Mr. Kaczmarek's interest ***." Even though petitioner owned a 50% interest, he did not sign the closing statement in his own name. When asked "why," he replied, "Because the deed had come from Kaczmareks' to Brewer and I felt I didn't want to mess up my interest by having it go any further." He maintained, however, that Brewer knew of his interest. He admitted that he had signed the Kaczmareks' names to the deed, and that Darianzo had notarized it, and that Darianzo had signed Mr. Kaczmarek's name to the "plat act affidavit" and notarized that, too. He attempted to explain the absence from the closing statement of any reference to the mortgage by saying he had promised Brewer to remove the mortgage "and that's why I didn't put it on the closing statement." Petitioner admitted there were no efforts made to remove or transfer the mortgage from the property being purchased by Brewer between the time Brewer signed the contract in April and the July 6 closing date. There was no discussion with Brewer of the possibility of his company buying the property subject to the mortgage.

In the questioning of petitioner by committee members it also developed that in at least one other real estate transaction (Bernacki) petitioner and Kaczmarek were the actual buyers although petitioner and Darianzo were shown as such. A $10,000 real estate commission was charged the seller there as well as in the Freston sale, a practice petitioner thought proper as long as the parties didn't object. It was also established that petitioner had signed the Kaczmareks' names to an affidavit of title on which a secretary in petitioner's accounting office had executed the jurat. His explanation for the various irregularities was that they were trying "to save paperwork" and took "too many shortcuts."

John Darianzo testified he had been admitted to prac-

tice about 5 years, 2½ of which were spent in Kane County and the balance in Du Page County, all as a sole practitioner. He rented space from petitioner and did some work for him for which he received credit on the rent. He and petitioner formed Addison Legal Services because Darianzo wanted to move to Houston as soon as petitioner was admitted to the bar; "we knew we were going to get Phil Wood and Jack Cunningham in there to take over some of the stuff," and "we wanted to keep it as open as possible." Darianzo admitted he signed the names of Winfried Kaczmarek and Mildred Kaczmarek to a corrective trust deed and Winfried Kaczmarek's name to a "plat act affidavit" with only oral authority from Mr. Kaczmarek and without talking to Mrs. Kaczmarek, whom he did not know but who was ill, and that he then notarized the affidavit himself. He also testified that Brewer was informed of the mortgage on the Freston property and that it would be removed; that Brewer knew of the alterations in the title policy documents; and that the mortgage reference was blocked out and the amount increased so that Brewer could see what the title was "going to look like when I get it back." He thought a secretary might have made the changes—"I don't recall." He excused the absence of a written power of attorney and signing the Kaczmareks' names without noting his agency on the grounds that the Kaczmareks lived in Rockford, some distance away. The fact that he had signed the Kaczmareks' names was not disclosed to Brewer. He conceded his actions were "a little bit improper," but he was "trying to expedite the matter." The fact that he was shown, on the closing statement prepared by him, as one of the buyers in the Bernacki real estate transaction in which he actually had no interest was "inadvertent"; he could not recall why he was shown as the seller in the closing statement prepared by him in the Sollitt real estate transfer when he had no interest in it. He agreed that his

listing as "of counsel" on the Addison Legal Services stationery implied the presence of other lawyers although there were none, but denied this was done to convey the impression that petitioner was a licensed attorney. According to Darianzo, petitioner's responsibilities in connection with Addison Legal Services were those of a landlord, but that petitioner also handled the billing and collection of the fees for legal services. Checks on Darianzo's business accounts had to be signed by any two of Darianzo, his secretary, petitioner or petitioner's wife.

Winfried Kaczmarek testified he had known petitioner six to eight years; that they had been and were in several real estate and business ventures together; that he had given him verbal authority to sign any necessary papers and take any necessary action in connection with any of their transactions; that he had never had any occasion to question petitioner's handling of his money, and that "As far as I am concerned, if he [petitioner] wants some money from me right now, he has got it."

Mrs. Bernacki testified that she had no complaints regarding petitioner and related her efforts to persuade the Frestons, whom she knew well, that petitioner, whom she had recommended to them, was reliable and that they need not worry about the mortgage regarding which they were receiving calls from Brewer.

Thomas Brewer, Sr., testified that he had asked petitioner about Lot 4, which was offered to them by another realtor; that petitioner said he controlled it and "could sell it to us direct" at a cash price of $120,000; and that a contract for its purchase was subsequently signed. During the first part of July the witness went to petitioner's office with a check for the property which he gave petitioner. The witness wanted to take the deed to have it recorded, but petitioner said he preferred to do it. There was no mention of any mortgage until July 28 when he received a letter from the bank which had taken title as trustee for

him. He had received a title commitment at the closing, but there was no change made in it that he knew about, and he did not know until after talking to the bank that a mortgage reference in the title commitment given him had been blocked out. John Darianzo had been sitting at his desk on the other side of the room while the witness dealt with petitioner. On other occasions when the witness had purchased real estate he had retained a lawyer, but he assumed petitioner was one. All of the sellers' signatures on the document had been affixed before the witness arrived. Brewer was asked about an October 19, 1978, letter to petitioner which referred to "clear title" being promised on July 6 and three specified September and October dates. That reference was explained as resulting from the witness' efforts to get a closing date set and petitioner's indication that he would have it "all complete" on the 6th. Brewer again asserted that there was no disclosure of the mortgage or discussion about it until after the July 28 notice from the trustee bank. He stated that he no longer had any faith at all in petitioner.

The final witness before the Committee was Bruce Heidecke, a lawyer who represented the Frestons in their sale to Kaczmarek. He testified that at no time during that transaction did he or his clients know that petitioner was a partner with Kaczmarek. He also testified to participating in a December 20, 1977, real estate closing in which petitioner appeared. The witness represented the seller, and petitioner, who was not the broker in the sale, appeared to represent the Garzas, who were buying the property. Petitioner, Heidecke testified, took all of the documents tendered by Heidecke, examined them and explained their significance to the Garzas. Although petitioner did not so state, the witness assumed petitioner to be the Garzas' lawyer. Petitioner subsequently filed an affidavit stating he attended the closing solely as a broker and friend of the Garzas. The affidavit does not

indicate petitioner to have acted as a broker in that sale; it does state petitioner did not charge a fee and did not represent himself to be a lawyer.

A number of letters and statements from clients, friends and community residents, including a Lewis University professor, were filed attesting to petitioner's honesty and competency.

The Committee filed with the Board a unanimous report reciting the evidence and stating certain conclusions. Petitioner's conduct was found to be "inexcusable," and the report indicated the Committee could "not accept" petitioner's explanation of his failure to disclose the Alloy Piping litigation. The Committee found "unconscionable" the procedures followed by petitioner, particularly with reference to the Alloy and Freston transactions, indicating to the Committee "a serious defect in the character of the applicant, rendering him unfit to practice law in Illinois." A further reason for denying certification was found by the Committee in its belief that "the procedure followed with respect to the 'Addison Legal Service' was simply a subterfuge to permit Ascher to practice law without a license."

It is well established that the exercise of discretion by a committee on character and fitness in its consideration of an applicant's fitness for admission to practice law in this State will not be reversed by this court unless certification has been arbitrarily refused. (See *In re Latimer*, (1957), 11 Ill. 2d 327, 330, *appeal dismissed* (1957), 355 U.S. 82, 2 L. Ed. 2d 111, 78 S. Ct. 153; *In re Frank* (1920), 293 Ill. 263, 264; see also Sprecher, *Admission to Practice Law in Illinois*, 46 Ill. L. Rev. 811, 835 (1952).) It is, moreover, clear that the burden of proving the requisite good moral character and fitness lies on the applicant. See *In re Martin-Trigona* (1973), 55 Ill. 2d 301, 305, *cert. denied* (1974), 415 U.S. 910, 39 L. Ed. 2d 465, 94 S. Ct. 1404; see also, Weiss, *The Commit-*

tee on Character and Fitness: The Supreme Court's Private Investigators!, 45 Ill. Bar J. 818, 822 (1957).

Recent decisions of this court have emphasized the importance of an applicant's duty to respond fully and accurately to those questions posed in an application for admission to the bar. (See *In re Mitan* (1979), 75 Ill. 2d 118, 127, *cert. denied* (1979), 444 U.S. 916, 62 L. Ed. 2d 171, 100 S. Ct. 231; *In re Martin-Trigona* (1973), 55 Ill. 2d 301, 307, *cert. denied* (1974), 415 U.S. 910, 39 L. Ed. 2d 465, 94 S. Ct. 1404; see also Illinois Code of Professional Responsibility, Disciplinary Rule 1–101(A) (1970); Committee on Professional Responsibility, Proposed Draft, Disciplinary Rule 1–101(A) (1980).) Other jurisdictions have similarly stressed the requirements imposed by this duty on bar applicants. In *In re Willis,* 288 N.C. 1, 18, 215 S.E.2d 771, 781, *appeal dismissed* (1975), 423 U.S. 976, 46 L. Ed. 2d 300, 96 S. Ct. 389, the North Carolina Supreme Court stated: "Misrepresentations and evasive or misleading responses, which could obstruct full investigation into the moral character of a Bar applicant, are inconsistent with the truthfulness and candor required of a practicing attorney," citing, *Carver v. Clephane* (D.C. 1943), 137 F.2d 685, *In re Meyerson* (1948), 190 Md. 671, 59 A.2d 489, *In re Greenblatt* (1938), 253 App. Div. 391, 2 N.Y.S.2d 569, and Annot., *Admission to Bar–Moral Character,* 64 A.L.R.2d 301, 318 (1959).

Because committees on character and fitness lack the personnel and other resources to conduct independent investigations of bar applications, they are obliged to rely primarily on truthful answers by the applicants to committee questionnaires as a source of material information. Failure to answer truthfully and fully has been held tantamou. t to a fraud upon this court and has resulted in the imposition of severe disciplinary measures. *In re Mitan* (1979), 75 Ill. 2d 118, 127, *cert. denied* (1979),

444 U.S. 916, 62 L. Ed. 2d 171, 100 S. Ct. 231, citing *People ex rel. Healy v. Propper* (1906), 220 Ill. 455, *People ex rel. Deneen v. Gilmore* (1905), 214 Ill. 569, and *People ex rel. Deneen v. Hahn* (1902), 197 Ill. 137.

When requested to list on his original questionnaire any action or legal proceeding, civil or criminal, in which he had been a party or otherwise involved, petitioner listed eight actions in which he was apparently a party and an unspecified number of traffic violations. When requested to update that list in a supplemental questionnaire, petitioner failed to indicate that Alloy had filed a suit against him by responding that there had been "no change" since the filing of his original statement. Petitioner has attempted to explain this false response by claiming that he believed the lawsuit had been reported on an earlier form. The Committee obviously did not believe that explanation, and the members' disbelief certainly cannot be said to be contrary to the manifest weight of the evidence. The creditability of petitioner's explanation is further strained by the fact that he stated in his sworn petition filed with this court that the Alloy suit "wasn't of such legal and ethical concern that it would inevitably impress one's consciousness, to the necessity of suppression." This assertion that the charges of forgery and fraud contained in the complaint filed by Alloy were not such as to cause serious concern regarding petitioner's moral character simply emphasizes petitioner's insensitivity to the improprieties and irregularities evidenced by his earlier conduct. Like the record in this case, petitioner's explanation demonstrates the existence of fundamental questions regarding petitioner's capacity to make those ethical judgments required of an attorney in the course of his practice and the performance of his fiduciary responsibilities. We can conclude only that the Committee's refusal to certify petitioner is not contrary to the manifest weight of the evidence. Indeed, it seems to us

the only conclusion a conscientious committee could reach.

If, however, further proof of unfitness were thought to be necessary, it is readily available in the fact that petitioner not only knew Darianzo had signed the Kaczmareks' names to the mortgage, but, incredibly, Darianzo had also signed Mr. Kaczmarek's name to the title affidavit, notarizing it as well; additionally, petitioner himself had signed the Kaczmareks' names to a deed and affidavit and had his secretary execute the jurat. Leaving aside the matter of the deeds, the gross impropriety in the execution and notarization of the affidavits is obvious even to the untrained mind. In neither case, apparently, was this procedure known to the other concerned parties.

During oral argument of this case, counsel for the Committee noted two other misrepresentations in petitioner's supplemental statement. When asked whether he had ever worked in a law office or had otherwise been employed by a lawyer, petitioner answered "no," in the original questionnaire, and "no change," on the supplemental statement. He did so despite the fact he was the registered owner of Addison Legal Services and had been serving as its business manager. In addition, he had answered "no" on both forms to the question whether he had ever been "accused by any employer, superior, associate, customer or other person of dishonesty in connection with any employment or occupation," even though the Alloy suit charged him with gross misconduct including fraud and forgery.

Petitioner has repeatedly asserted in oral argument and in his briefs that Alloy has received what it paid for as though the belated payment and release of the mortgage completely eliminated all problems. True, Alloy apparently has, several months after filing a lawsuit to compel it, received the clear title to Lot 4 for which it paid some six months earlier. But the character and fitness require-

ments of the legal profession are not met simply by ultimately delivering that which was wrongfully withheld originally. The integrity of our profession can be no greater than that of its members, and we protect neither our profession nor the public when we admit to the profession those who have demonstrated the insensitivity to its standards which is evident here.

The petition for admission to the bar of this State is denied.

Petition denied.

UNITED STATES OF AMERICA
STATE OF ILLINOIS
SUPREME COURT

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

PRESENT:

JOSEPH H. GOLDENHERSH, CHIEF JUSTICE
JUSTICE ROBERT C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN
JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS E. KLUCZYNSKI

TYRONE C. FAHNER, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 26th day of September, A.D. 1980, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

In re:

M.R. 2391

Walter A. Ascher

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being fully advised of and concerning the premises, doth overrule the prayer of said petition and denies a rehearing in this cause.

No. 80-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ASCHER,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the Petition for Writ of Certiorari comply with the requirements of the Supreme Court of the United States, Rule 21?

II. Whether Petitioner acquiesced in the procedure at the hearing before the Committee, whether the claim of denial of the right to cross-examination was not raised by the Petitioner at the hearing or in the Court below, and whether this Court can decide issues raised for the first time in a Petition for Writ of Certiorari?

III. Whether the conclusion and findings of the Character and Fitness Committee were in accordance with law and were not arbitrary?

IV. Whether the Committee's decision and the opinion below of the Illinois Supreme Court are fully supported by the evidence?

V. Whether the authority cited by the Petitioner in support of a due process claim is relevant to the facts of this case?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ASCHER,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, State of Illinois, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

OPINIONS BELOW

The opinion of the Illinois Supreme Court appears in the Appendix of the Petition for Writ of Certiorari, and is reported at 81 Ill. 2d 473, 411 N.E. 2d 1. The decision

of the Committee on Character and Fitness for the Second Judicial District of Illinois is reproduced in Appendix A of this Brief and has not been published.

JURISDICTION

The petition invokes the jurisdiction of this Court pursuant to 28 U.S.C.A. 1257(3), and the Respondent denies that the jurisdiction of this Court has been properly invoked.

STATUTES INVOLVED

Ill. Rev. Stat. Chapter 38

17-3. Forgery.

§ 17-3. Forgery. (a) A person commits forgery when, with intent to defraud, he knowingly:

(1) Makes or alters any document apparently capable of defrauding another in such manner that it purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority;

Ill. Rev. Stat. Chapter 110

40. Pleadings to be specific.

(2) Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states in his pleading that he had no

knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny.

Ill. Rev. Stat. Chapter 110A

704. (Supreme Court Rule 704). Qualifications on Examination:

(a) Any person who meets the educational requirements set forth in Rule 703 may make application to the Board of Law Examiners for admission on examination.

(b) Applications shall be in such form as the board shall prescribe and shall be accompanied with proof that the applicant meets the requirements of Rule 701, together with proof of his educational qualifications. In the event the proof shall be satisfactory to the board, the applicant shall be admitted to examination.

(c) The Board of Law Examiners shall conduct two examinations annually, one in March and the other in September, or at such other times as the board, in its discretion, may determine. The examinations shall be conducted under the supervision of the board by uniform printed questions. The examination may be upon the following subjects: administrative law; agency; business organizations; commercial paper; conflict of laws; contracts; criminal law and procedure; domestic relations; equity jurisprudence, including trusts and mortgages; evidence; federal and state constitutional law; federal taxation; Illinois procedure; legal ethics; personal property, including sales and bailments; real property; suretyship; torts; and will and administration of estates.

(d) If an applicant fails to pass his first examination, he may be permitted to take successive examinations provided he furnishes the

board with satisfactory evidence of diligent study of the law since his prior examination. An applicant who has been rejected at a fifth examination shall not again be admitted to an examination except upon the permission of the Board of Law Examiners or the Supreme Court. The board or Court so granting the permission may, as a condition to the granting of another examination, prescribe a further course of study.

(e) In the event the Board of Law Examiners shall find that such applicant meets the requirements of these rules, and has received from the Committee on Character and Fitness its certification of good moral character and general fitness to practice law, the board shall certify to the court that such applicant is qualified for admission. Amended eff. Oct. 2, 1972.

Ill. Rev. Stat. Chapter 110A

708. (Supreme Court Rule 708). Committee on Character and Fitness.

(a) At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Judicial Districts of this state, consisting of not less than three members of the bar. The members of the Board of Law Examiners shall be ex-officio members of the committee.

(b) Before admission to the bar, each applicant shall be passed upon by the committee in his district as to his good moral character and general fitness to practice law. He shall furnish the committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history. Each applicant shall appear before the committee of his district or some member thereof and shall furnish the committee such evidence of his good moral character and general fitness to

practice law as in the opinion of the committee would justify his admission to the bar.

(c) If the committee is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar. If the committee is not of that opinion, it shall file with the Board of Law Examiners a statement that it cannot so certify, together with a report of its findings and conclusions.

(d) An applicant who has availed himself of his full hearing rights before the Committee on Character and Fitness and who deems himself aggrieved by the determination of the committee may, on notice to the committee, petition the Supreme Court for relief. Amended eff. Oct. 2, 1972.

Ill. Rev. Stat. Chapter 110A

709. (Supreme Court Rule 709). Power to make Rules, Conduct Investigations, and Subpoena Witnesses.

(a) Subject to the approval of the Supreme Court, the Board of Law Examiners and the Committee on Character and Fitness shall have the power to make, adopt, and alter rules not inconsistent with this rule, for the proper performance of their respective functions.

(b) The Board of Law Examiners and the Committee on Character and Fitness for each judicial district are hereby respectively constituted bodies of commissioners of this court, who are hereby empowered and charged to receive and entertain complaints, to make inquiries and investigations, and to take proof from time to time as may be necessary, concerning applications for admission to the bar, examinations given by or under the supervision of the Board of Law

Examiners, and the good moral character and general fitness to practice law of applicants for admission. They may call to their assistance in such inquiries and investigations, and take the testimony of witnesses. The hearings before the commissioners shall be private unless any applicant concerned shall request that they be public. Upon application by the commissioners, the clerk of the Supreme Court shall issue writs of subpoena ad testificandum, writs of subpoena duces tecum or dedimus potestatem to take depositions. Witnesses shall be sworn by a commissioner or any person authorized by law to administer oaths. All testimony shall be taken under oath, transcribed, and transmitted to the court, if requested. The commissioners shall report to the Supreme Court the failure or refusal of any person to attend and testify in response to a subpoena. Amended eff. Oct. 2, 1972.

STATEMENT OF THE CASE

The Respondent adopts the statement of the case as presented by the Illinois Supreme Court in the opinion below, which appears as the Appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT COMPLY WITH THE REQUIREMENTS OF THE SUPREME COURT OF THE UNITED STATES, RULE 21.

Rule 21 of this Court states the requirements for a Petition for Writ of Certiorari. Section 2 of Rule 21 states in part as follows:

> "The clerk shall not accept any Petition for Writ of Certiorari that does not comply with this Rule. . ."

Furthermore, Section 5 of Rule 21 states as follows:

> "The failure of the petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration would be a sufficient reason for denying his petition."

The Petition for Writ of Certiorari failed to comply with several important provisions of Rule 21. Based on these deficiencies, the Petition for Writ of Certiorari should be denied.

Section 1(f) of Rule 21, requires that a petition set out verbatim any constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves. The petition at pages 3, 7, 8, 9, and 17 cites to a Illinois Supreme Court Rule or Illinois Statute. However, the petition fails to set out the text of these rules and statutes as would be required by this Court's Rule 21.

The Petitioner claims "a denial of due process" throughout the petition. The Petitioner fails to state whether he is relying on the Illinois State Constitution

or the United States Constitution or perhaps some other basis for his due process claim. Not only does the petition fail to set out the text of the portion of the Constitution upon which it presumably relies, but it fails even to make an appropriate citation. Such matters clearly violate Rule 21.

Section 1(k)(ii) of Rule 21 of this Court requires that the Appendix to the petition contain:

> "Copies of any other such opinions, orders, findings of fact and conclusions of law rendered by courts or administrative agencies in the case. . ."

A copy of the decision of the Committee on Character and Fitness for the Second Judicial District of Illinois was provided to the attorneys for the Petitioner, nonetheless, the Petitioner failed to include a copy of that decision in the Appendix to his petition. For the convenience of this Court, a copy of this decision can be found in the Appendix to this Brief in Opposition to the Petition.

The above matters clearly violate the express requirements of this Court's Rule 21. The materials left out of the petition are essential to a ready and adequate understanding of the points which the petition claims requires consideration by this Court. On this basis alone, this Court should deny the Petition for Writ of Certiorari.

II.

THE PETITIONER ACQUIESCED IN THE PROCEDURE AT THE HEARING BEFORE THE COMMITTEE; THE CLAIM OF DENIAL OF THE RIGHT TO CROSS-EXAMINATION WAS NOT RAISED BY THE PETITIONER AT THE HEARING OR IN THE COURT BELOW AND THIS COURT CANNOT DECIDE ISSUES RAISED FOR THE FIRST TIME IN A PETITION FOR WRIT OF CERTIORARI.

It is Respondent's position that the Petitioner not only waived his rights to raise the constitutional question of deprivation of due process through lack of cross-examination before this Court by failing to assert that position before the Committee, but that Petitioner was accorded, in fact, essential due process and more at the hearing.

It is well settled constitutional law that failure of counsel to make a timely objection and to invoke the constitutional rights in question at the hearing results in an abandonment of those rights; *Estelle v. Williams*, (1976) 425 U.S. 501 at 508, 48 L. Ed. 2d 126 at 133.

Willner v. Committee on Character and Fitness, (1973) 373 U.S. 96, 10 L. Ed. 2d 224, relied upon by Petitioner (Petition p. 17) is vastly different in its facts from the case at bar. In *Willner*, no hearing or confrontation with adverse witnesses was had. Petitioner in *Willner* had no opportunity to ascertain and contest the basis of the New York Committee's report on him. As the majority opinion in *Willner (supra)* pointed out, the right to cross-examination is only "often" (10 L. Ed. 2d 224 at p. 229) required. There was no statement that it was invariable and universal.

In the case at bar, the hearing was complete, the procedure acquiesced in without objection, and confrontation and cross-examination was supplied by having all

questions desired to be put to the two adverse witnesses at the request of the Applicant asked by the Committee. Surely, Ascher's right to due process was not violated.

At no time during the hearing before the Committee did the Petitioner ever object to being unable to cross-examine personally the only two witnesses Petitioner did not himself present. Petitioner acquiesced in the procedure, which he "did not want to be adversary in nature" (R. 23). Adverse parties were not allowed to examine the Applicant (R. 251-252). And any questions or inquiries Applicant wished put to the adverse witnesses were in fact asked by the Chairman (R. 358).

The testimony of one adverse witness, Heidecke, was disregarded by the Committee in its entirety (Committee Opinion, Appendix p. 10A). The other witness, Brewer, was asked all questions desired by the Petitioner through the Committee. The Opinion of the Committee (Appendix) set forth in detail the reasons for the decision.

The Record fully documents these facts.

Counsel for the Applicant Ascher, Mr. Riley, at the opening of the hearing, unequivocally stated that he understood the procedure and had no objection to the exhibits (R. 8, 10). He understood that this was an inquiry into Mr. Ascher's character (R. 16); that he had both the right to open and close, and the burden of showing that the Applicant does have the proper character and fitness. (R. 16).

It was Mr. Riley who stated (R. 16): ". . . That this is an inquiry, that is not an adversary hearing . . . What you are doing is taking all the evidence, pro and con, on Mr. Ascher's application for a certificate of character and fitness."

When Chairman Fuqua said: "But we are most assuredly not here to resolve the issues of the civil case . . .," Mr. Riley replied (R. 17): "I want to make that perfectly clear. We are not prepared to try the lawsuit . . . There is a meeting of the minds there." Later (R. 23), Mr. Riley stated: ". . . I don't want this to be an adversary hearing, I want everything brought out. You have to meet this man, because he is asking you for a certificate. You have got to meet him, but I don't want to be in the position of adversary."

In the preliminary colloquy, it was agreed between all parties that Mr. Ascher would be allowed to open the hearing with his evidence in view of the fact that he was the Applicant and he was the one seeking admission, and that any testimony in correction or explanation of his testimony would then be heard, and that Mr. Ascher would then be allowed to rebut that, again, in view of the fact that it was his application (R. 25).

Walter Ascher's testimony occupied the Record from Pages 42 through 255. Mr. Riley, his counsel, was allowed to examine him freely. The Committee on Character and Fitness asked questions, to which he made such responses as he chose. The only limitation on Ascher's testimony was the Committee's ruling that the complaining witness, Attorney Culliton, was not allowed to question the Applicant. Certainly, this was in the Applicant's favor and he may not be heard to complain of it (R. 251, 252). The remaining witnesses for the applicant, Winfried Kaczmarek (R. 256-265), John Darianzo (R. 265-310), and June Bernacki (R. 310-327), were directly examined by Mr. Riley and responded to questions put by the Committee without objection by Mr. Riley at any time.

The witnesses who were adverse to the Applicant, Thomas Brewer (R. 327-365) and Bruce Heidecke (R. 366-403), were first examined by the Committee Chairman, Mr. Fuqua. There was no objection from the Applicant. With respect to Mr. Brewer, Mr. Riley began to object to Brewer's reading from some notes and the witness put the notes away (R. 338). The remaining members of the Committee then questioned the witness (R. 347 ff.).

At Mr. Riley's request (R. 538): "I would like to have you refer, Mr. Chairman, to this exhibit here and ask the witness what he meant about the clear title he was promised on July 6th. 'I have waited three months.' That is the only area we are concerned with."

The Committee then examined, on this suggested line of inquiry by Mr. Riley, for a considerable length of time (R. 358-361).

This was all done without objection from Mr. Riley. Mr. Riley, in addition, was given permission to submit anything to the Committee that he would like to address to the Committee in writing and he asked, and was granted permission, to submit a layout of the offices and pictures at the combined law office and realtor's office at 603 Addison (R. 365).

The last witness was a Bruce Heidecke, an attorney. Mr. Riley was allowed to object to this witness's testimony (R. 370). The Committee did not deem the finding of facts with reference to Heidecke's testimony necessary to its determination of the matter (Committee Opinion, Finding 35, Appendix p. 9A). When the witness testified, in substance, that Mr. Ascher was at a real estate closing representing a Mr. and Mrs. Garza, Mr. Riley was allowed to break in and directly question his own client, Mr. Ascher (R. 373):

"The Witness: . . . Mr. Ascher, was there representing Louis and Sanjuanita Garza, G-a-r-z-a.
Mr. Riley: Were you?
Mr. Ascher: No."

Mr. Riley then secured the permission of the Committee to order any portion of the transcript for his own use (R. 374). When the witness sought to tell what happened at this closing, Mr. Riley objected (R. 377); hence, the matter was postponed on the motion of the Committee (R. 378-379) and the matter was never reached. Mr. Riley did not even seek to address a question to the witness through the Chairman (R. 393), merely asking for a copy of all Mr. Heidecke's testimony (R. 393-394): "We would want to get a copy of it because we would want the opportunity to meet it."

Mr. Riley then explicitly stated:

> "Also, inasmuch as we are not going to settle this thing until we get Mr. Heidecke's problems out of the way, I have no objection to that file with the hearsay of somebody saying Mr. Ascher practiced law without a license. That is relevant now. It's out in the open . . . So I would like to have that file in the possession of the Committee, . . ." (R. 394).
>
> "I want that introduced into evidence now. I don't want any oral testimony independent of that. . . . I am referring to his file, the file that he is reading from. He was reading from this file all the time he was attempting to testify about this practicing without a license." (R. 395)
>
> "I have no objection to a hearing on this matter as long as we are given complete disclosure of what we are to meet." (R. 397).

Later, the witness admitted that he was just assuming that he, Ascher, was the lawyer (R. 399), and when Chairman Fuqua asked (R. 400): "Now, Mr. Riley, is there anything that you wish me to pursue along that line of questioning?" Mr. Riley responded (R. 400-401):

> "No, Mr. Chairman, there is not. All I want is time now and a date . . . for us to meet these two issues: . . . that Mr. Ascher didn't tell the truth under oath; and, furthermore, the circumstances of whether he did or did not appear at this closing and what he did or did not do in what capacity. We would like that, because in the present state of where we are now with Mr. Ascher's application, we must answer these allegations."

The Chairman, Mr. Fuqua, agreed with Mr. Riley and suggested an alternative of an affidavit from the Applicant Ascher, or another meeting with the Committee to hear Ascher say it, or ". . . do you think there is some other way that you could present it to us . . .?" (R. 401).

Mr. Riley requested permission to gather his material together, make his decision, and transmit the material to the Committee.

It is thus clear from the record without contradiction, that Ascher at no time objected to the Committee's procedure, that at no time did the Committee's procedure preclude Ascher, through his counsel, from asking any questions through the Chairman that he cared to ask, and that he was allowed a full and complete opportunity to address questions to the two adverse witnesses through the Chairman. At no time did Petitioner ever object to the proceeding or to any supposed lack of cross-examination rights.

At pages 16 and 17 of the Petition at attempt is made to raise an issue concerning the right to cross-examine. This Court will note that this claim was not decided, addressed, or even mentioned by the opinion below of the Illinois Supreme Court. The reason for this is simply that the Petitioner failed to claim a denial of a right to cross-examination in his Petition to be Admitted to

Practice, Memorandum of Law in Support of Petition, Reply Brief, and Petition for Re-hearing, all of which were addressed to the Illinois Supreme Court. It is the clear and unequivocal policy of this Court that it will not decide issues raised for the first time in a Petition for Writ of Certiorari.

This policy has been recently affirmed in the case of *Tacon v. Arizona*, (1973) 410 U.S. 351, 35 L. Ed. 2d 346. In this case, the primary legal issues concerned a state's power to try a criminal defendant in absentia. In dismissing the Writ of Certiorari as improvidently granted, this court stated:

> "Upon reviewing the record, however, it appears that these broad questions were not raised by the Petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here." (410 U.S. 351 at 352, 35 L. Ed. 2d 346 at 348.)

There is no issue concerning the Petitioner's right to cross-examination properly before this Court. The Petition for Writ of Certiorari should be denied.

III.

THE CONCLUSIONS AND FINDINGS OF THE CHARACTER AND FITNESS COMMITTEE WERE IN ACCORDANCE WITH LAW AND WERE NOT ARBITRARY.

Although it is at best unclear what exactly the nature of the Petitioner's claim is in this regard, apparently, the Petitioner is claiming that the conclusions of the Character and Fitness Committee were "subjective" and, therefore, defective in some way.

This Court has long recognized the unique nature of the character and fitness requirement of applicants to the practice of law.

In one such case, the New York state standard that applicants must possess the "character and general fitness requisite for an attorney and counselor at law" was challenged as being vague and overbroad: *Law Students Research Council v. Wadmond* (1971), 401 U.S. 154, 27 L. Ed. 2d 749. In upholding this standard, this court stated as follows:

> "Long usage in New York and elsewhere has given well defined contours to this requirement, which the appellees have construed narrowly as encompassing no more than 'dishonorable conduct relevant to the legal profession.'" (401 U.S. 154 at 159, 27 L. Ed. 2d 749 at 746).

Mr. Justice Frankfurter once stated concerning this matter that:

> "No doubt satisfaction of the requirement of moral character involved an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicants for admission, a judgment of which it may be said as it was of many honest and sensible judgments in a different context that it expresses an intuition of experience which outruns analysis and sums up many unnamed intangled impressions; impressions which may lie beneath consciousness without losing their worth. (Citation omitted). Especially in this realm, it is not our business to substitute our judgment for the state's judgment—for it is the state in all the *panoply* of its powers that is under review when the action of their supreme court is under review." (Concurring opinion in *Schware v. Board of Bar Examiners* (1957) 353 U.S. 232 at 248, 1 L. Ed. 2d 796 at 807).

This Court has thus acknowledged the difficult task which State Character and Fitness Committees are faced with when reviewing applicants for admission to the practice of law. At page 16 of the Petition it is

claimed that a conclusion of "inexcusable conduct" is for some unknown reason too subjective to support the Committee's and the Illinois Supreme Court's decisions. With this Court having expressly found that the conclusion of "dishonorable conduct relevant to the legal profession" was constitutionally valid, the argument that the conclusion of "inexcusable conduct" is somehow constitutionally defective loses all credibility.

While the Petition is not clear on this point, there appears to be some claim to the effect that the Committee was required to press specific charges against the Petitioner and then make a finding of a violation of morals or of law. The only case cited by the Petitioner on this point concerned the rights of an attorney in disbarment proceedings (Petition at pp. 22-23). This case is not relevant to the issues before this Court.

The relevant case law on this issue is properly stated as follows:

> "Admission cases are not governed by the same rule as disciplinary action against attorneys, where definite charges are lodged. Under our rule the committee is charged with the duty of inquiry and investigation, not preferring charges, in granting certificates only to such personnel as are fit, by good character and morals, to be admitted to the practice of law." (*In re Latimer* (1957) 11 Ill. 2d 327 at 332, *cert. denied*, 355 U.S. 82, as quoted in, *In re Martin-Trigona* (1973) 55 Ill. 2d 301 at 311, *cert. denied* 417 U.S. 909).

Respondent acknowledges that these two cases are Illinois Supreme Court cases. It should not go unnoticed that this Court denied certiorari in both of those cases, as should be done in the case at hand.

IV.

THE COMMITTEE'S DECISION AND THE OPINION BELOW OF THE ILLINOIS SUPREME COURT ARE FULLY SUPPORTED BY THE EVIDENCE.

The Petitioner apparently claims a denial of due process on the basis that the decision of the Character and Fitness Committee and the opinion of the Illinois Supreme Court were not supported by the evidence. Before addressing the lack of merit of this claim, one important factor should be noted. This Court has found that where there is no federal question properly before this Court, as is the case here, and the remaining issue is merely factual, then certiorari should be denied.

In *Tacon v. Arizona (supra)* this Court determined that it could not hear the Petitioner's legal claim since it had not been raised in the state court below and then refused to hear any claim concerning a voluntary waiver of the Petitioner's right because:

> "Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the Writ of Certiorari is dismissed as improvidently granted." (410 U.S. 351 at 352, 35 L. Ed. 2d 346 at 348).

Therefore, without even addressing the lack of merit of the Petitioner's factual claim, it is clear that the lack of a viable federal question properly before this Court justifies a denial of the Petition for Writ of Certiorari.

Nonetheless, a brief discussion of the findings and the evidence which support the denial of the Petitioner's application to practice law is in order.

On May 31st, 1979, a hearing was had before the entire membership of the Character and Fitness Committee for the Second Judicial District of Illinois. At that time, both the Committee and the Applicant were

represented by counsel. The Committee heard the testimony of the Applicant, now the Petitioner, and of five other witnesses. The Committee further received into evidence 13 exhibits on behalf of the Committee and 26 exhibits on behalf of the Applicant. Following the hearing, the Applicant submitted and the Committee received ten further exhibits.

The Committee made 35 specific findings of fact based upon the evidence. The full text of these findings are found in the Committee's decision in the Appendix to this Brief. A summary of the highlights of these findings follows:

The Applicant is an accountant and real estate broker. His net worth is in excess of $800,000.00. The Applicant testified that he was the business manager of an operation called, "Addison Legal Services." One of the Applicant's exhibits further showed that the Applicant was a part-owner of this business. The Applicant maintained a single telephone service for his real estate office, his accounting office, and the Addison Legal Service.

In one real estate transaction during the end of 1977, the Applicant, or his business associates, forged the signature of the buyer on various documents. In another real estate transaction, which closed in July of 1978, a trust in which the Applicant was a named beneficiary, was the purported seller. Yet, the trust never had any interest in the property. In the same transaction, the Applicant presented the buyer with a Report of Title in which a first mortgage had been deleted by the process of covering that disclosure with a piece of paper and photocopying the Report of Title. The Applicant had the incredible explanation for this when he testified that he presented the buyer with a photocopy of the Title Report

so that the buyer would know what it would look like *after* the mortgage had been paid. Also regarding this transaction, the Applicant prepared the Affidavit of Title and the Deed and signed the names of the owners of the property to the affidavit, although he had no written authorization to do so. The distribution of funds from this transaction revealed that the Applicant had the right to write checks upon the Addison Legal Services Escrow Account. The buyer testified that the closing on this transaction was handled exclusively by the Applicant. The buyer further testified that it was his assumption that the Applicant was a lawyer and for that reason the buyer did not hire a lawyer to represent himself.

As a result of some of the Applicant's prior real estate transactions, on November 2nd, 1976, a civil suit (Alloy Piping suit) was filed against the Applicant. The complaint alleged that the Applicant had breached a fiduciary relationship, and had committed various frauds against the plaintiff, who had been a client of the Applicant regarding tax accounting and real estate deals. The complaint requested injunctive relief, actual and punitive damages, and a declaration holding the Applicant in contempt of court for the unauthorized practice of law. When the Applicant filled out his questionnaire, which was to be submitted to the Character and Fitness Committee regarding his application to practice law in February of 1979, he failed to mention this lawsuit. His only excuse was that he thought he had already furnished the information in a prior questionnaire. However, this would have been impossible since the prior questionnaires had been given to the Committee prior to the filing of the lawsuit.

Based upon these findings and the evidence presented, the Committee in its decision listed six specific conclusions. A brief summary of these conclusions follows:

Regarding the nondisclosure of the litigation, the Committee concluded:

> "The nature of the charges and the Alloy Piping litigation are such that Mr. Ascher must have known that the charges would seriously reflect upon his character. The Committee can not accept the suggestion that it was his best recollection that he had disclosed the lawsuit in prior documents."

The Committee further concluded that the handling of the various real estate deals by the Applicant had been "improper," and that in two cases the Applicant's actions were "unconscionable and indicates to the Committee a serious defect in the character of the Applicant, rendering him unfit to practice law in Illinois."

The Committee further concluded that the Applicant's dealings with the Addison Legal Service were "simply a subterfuge to permit Ascher to practice law without a license."

It was on the basis of the evidence presented at the hearing, upon the findings and conclusions reached by the Committee, that the Committee by a vote of six to zero (6 to 0) denied the Applicant's application for a certificate of character and fitness.

The opinion below of the Illinois Supreme Court upon review of the record and the Committee's decision found ample evidence to support the Committee's decision. Specifically, the opinion below found three factual bases to support the denial of the Petitioner's application to practice law.

First, the opinion below notes the Petitioner's failure to disclose the pending lawsuit in his questionnaire filed with the Committee. In regards to this matter, the opinion below stated:

> "Petitioner has attempted to explain his false response by claiming that he believes the lawsuit had been reported on an earlier form. The Committee obviously did not believe that explanation, and the members' disbelief certainly can not be said to be contrary to the manifest weight of the evidence. The credibility of Petitioner's explanation is further strained by the fact that he stated in his sworn petition filed with this Court that the Alloy suit 'wasn't of such legal and applicable concern that it would inevitably impress one's consciousness, to the necessity of suppression.' This assertion that the charges of forgery and fraud, contained in the complaint by Alloy, were not such as to cause serious concern regarding Petitioner's moral character simply emphasized this Petitioner's insensitivity to the improprieties and irregularities evidenced by his earlier conduct. Like the record in this case, Petitioner's explanation demonstrates the existence of fundamental questions regarding Petitioner's capacity to make those ethical judgments required of an attorney in the course of his practice and performance of his fiduciary responsibility." (Appendix to Petition for Writ of Certiorari, p. 15a).

Regarding the signatures forged by the Applicant in the instances where names were signed without written authorization the opinion below stated:

> "Leaving aside the matter of the deeds, the gross impropriety in the execution and notarization of the affidavits is obvious even to the untrained mind. In neither case, apparently, was this procedure known to the other concerned parties." (Appendix to Petition for Writ of Certiorari, at p. 16a).

Finally, the opinion below noted that during oral argument of the case before the Illinois Supreme Court, counsel for the Committee noted two other misrepresentations in Petitioner's supplemental questionnaire.

One, the Petitioner failed to disclose that he had ever worked in a law office or had otherwise been employed by a lawyer, despite the fact that he was the registered owner of the Addison Legal Services and had been serving as its business manager. And two, the Petitioner had answered "No" on both questionnaires to the question as to whether the Petitioner had ever been "accused by any employer, superior, associate, customer, or other person, of dishonesty in connection with any employment or occupation" even though the pending lawsuit charged the Petitioner with gross misconduct, including fraud and forgery regarding a relationship with a client.

The Court concluded by noting that the Petitioner's apparent position was that the seller of the property in the pending lawsuit eventually was paid what was due him. In response to this position, the opinion below stated:

> "But the character and fitness requirements of the legal profession are not met simply by ultimately delivering that which was wrongfully withheld originally. The integrity of our profession can be no greater than that of its members, and we protect neither our profession nor the public when we admit to the profession those who have demonstrated the insensitivity to its standards which is evident here." (Appendix to Petition for Writ of Certiorari at pp. 16a-17a).

Clearly, an examination of the decision of the Character and Fitness Committee and of the opinion below of the Illinois Supreme Court shows that there is

substantial evidence which supports the denial of the Petitioner's application to practice law. The Petitioner was not denied any due process rights. The Petition for Writ of Certiorari should be denied.

V.

THE AUTHORITY CITED BY THE PETITIONER IN SUPPORT OF A DUE PROCESS CLAIM IS NOT RELEVANT TO THE FACTS OF THIS CASE.

The Petition inexplicably places principal reliance on two cases decided during the "Red scare" of the 1950's. In a nutshell, these two cases stand for the simple proposition that one may not be denied admission to the practice of law solely on the basis of past membership in the Communist Party. In the case at bar, admission was denied because personal actions of the Petitioner *himself* revealed that he did not have the requisite moral character and fitness.

A more detailed analysis of the two cases relied upon reveals just how misplaced the Petitioner's reliance on these cases really is.

At page 20 of his Petition, the Petitioner states that:

> "The issue here is much similar to that in *Konigsberg v. State Bar*, 353 U.S. 252."

The only similarity between *Konigsberg* and the present case is that both concern a petitioner who was denied application to the practice of law.

At the outset of the *Konigsberg* opinion, this Court noted that:

> "There is no criticism in the record of his (Petitioner) professional work." (353 U.S. 252 at 266, 1 L. Ed. 2d 810 at 820).

This Court later noted that:

> ". . . not a single person testified that Konigsberg's moral character was bad or questionable in any way." (353 U.S. 252 at 265, 1 L. Ed. 2d 810 at 821).

Surely, the record presented to the court in *Konigsberg* is in no way similar to that which would be presented to the Court in this Petitioner's case. In this case, several witnesses testified to the Character and Fitness Committee regarding the Petitioner's improper conduct and dealings in regard to the Petitioner's profession as an accountant and real estate agent. Simply put—if Petitioner acted as he did in those professions, it was reasonable to infer he would act that way as a lawyer. But there is more: Petitioner *concealed* the lawsuit from the Committee, whatever its merits. He thus undermined the entire assessment of character process. Petitioner's suggestion (Petition p. 14) that "calmer minds . . . would have at least kept the failure to disclose the pending civil litigation to the level of civil litigation" is incredible. It also reveals Petitioner's indifference to or ignorance of the standards of the legal profession.

The real question faced by this Court presently is similar to that faced by the Court in *Konigsberg*. In *Konigsberg*, this Court stated:

> ". . . the question is whether on the whole record a reasonable man could fairly find that there were substantial doubts about Konigsberg's honesty, fairness, and respect for the rights of others and for the laws of the state and nation." (353 U.S. 252 at 264, 1 L. Ed. 2d 810 at 820).

With the question framed in this manner, there can be no doubt whatsoever that the Petitioner in the instant case was properly denied his application to the practice of law.

The Petition also mysteriously finds great similarity between this case and the case of *Schware v. Board of Bar Examiners*, (1957) 353 U.S. 232, 1 L. Ed. 2d 796. In *Schware*, this Court noted that:

> "He (Petitioner) demonstrated candor by informing the board of his personal history and by going to the dean of the law school and disclosing his past. The undisputed evidence in the record shows Schware to be a man of high ideals with a deep sense of social justice. Not a single witness testified he was not a man of good character." (353 U.S. 232 at 240, 1 L. Ed. 2d 796 at 802).

Once again, it must be mentioned that the facts of *Schware*, as mentioned above, are not at all similar to the facts presented by this case.

As in *Konigsberg*, this Court noted that the denial of the petitioner's application to practice law was based primarily on the petitioner's involvement with the Communist Party. This Court then held that membership in the Communist Party cannot be the basis for an inference of bad moral character. (353 U.S. 232 at 247, 1 L. Ed. 2d 796 at 806).

The cases relied upon by the Petitioner are not relevant to the facts and issues of this case. The Petition for Writ of Certiorari should be denied.

CONCLUSION

The form and content of the Petition for Writ of Certiorari fails to comply with this Court's Rule 21. This failure alone is sufficient reason to deny the petition.

There is no federal question properly before this Court for review. The alleged denial of the right to cross-examine was not raised in the Illinois Supreme Court and may not be considered for the first time before this Court. The procedure followed by the Character and Fitness Committee was in accordance with the law. The decision of the Character and Fitness Committee and of the Illinois Supreme Court is in accordance with the law and is supported by the evidence. There is no Federal question properly before this Court for review.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Decision of the Committee on Character and Fitness for the Second Judicial District of Illinois

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IN THE MATTER OF THE APPLICATION OF
WALTER ANTHONY ASCHER
TO BE ADMITTED TO THE
BAR OF ILLINOIS ON EXAMINATION.

The application of Walter Anthony Ascher was first reviewed by John R. MacKay, a member of the Character and Fitness Committee for the Second Judicial District. Because of apparent problems in this application Mr. MacKay called for a hearing before the entire committee and on May 31, 1979, commencing at 9:00 o'clock A.M. and continuing throughout the day a hearing was conducted. The hearing took place in the Offices of the Appellate Court of the State of Illinois Second District in the Appellate Court Building. Present on behalf of the committee were: Joseph A. Donovan, Stephen A. Ellis, Ellis E. Fuqua, Donald J. Hennessy, John R. MacKay and Ben Rifkin. Mr. Fuqua was chosen as Chairman of the meeting. Also present were: Mr. Ascher and his wife Erika Ascher, Mr. Francis X. Riley and Mrs. Phyllis Gurber, attorneys for Mr. Ascher, and Mr. Stephen J. Culliton. The committee heard the testimony of Mr. Ascher, Winfried Kaczmarek, John Darianzo, June Bernacki, Thomas Brewer, Sr. and Bruce Heidecke. During the course of the hearing Committee's Exhibits 1 through 13, inclusive, and Applicant's Exhibits 1 through 26, inclusive, were received.

Following the hearing the applicant submitted additional exhibits designated as Applicant's Exhibits 27 through 37, inclusive, and these were made known to the committee members by means of correspondence from the chairman of the committee.

The committee first received Committee's Exhibits 1 through 6, inclusive, from which it became apparent that Ascher first filed his questionnaire and statement in November of 1977. He took the February 1978 Illinois Bar Examination and failed it. He likewise took and failed the July 1978 examination, and then passed the February 1979 examination. He filed an additional questionnaire which indicated among other things that there had been "no change" as to whether or not he had ever been a party in any civil or criminal proceeding. An objection was filed in Mr. Ascher's application arising out of the case of *Alloy Piping, Inc. v. Walter Ascher and Village Center Realty and Winfried and Mildred Kaczmarek*, DuPage County Circuit Court No. 78 CH 483, containing serious charges against Ascher involving his integrity.

It was stated by the chairman that the committee was interested in the issues as to why the lawsuit was omitted in the additional questionnaire and Mr. Ascher's conduct in the matter in whatever capacity he was acting and whether or not he purported to act as a lawyer while not licensed.

After discussion among the committee and having heard the suggestions of interested parties it was decided by the committee that witnesses would be excluded although Mr. Ascher and his attorneys and Mrs. Ascher would remain and that Attorney Culliton would remain in the hearing.

After hearing the testimony of the witnesses and having examined the exhibits the committee finds, as follows:

1. The applicant is an accountant and real estate broker. His real estate business is incorporated and known as Village Center Realty Incorporated with its Principal place of business in Addison, Illinois. Ascher is a licensed real estate broker. He is licensed as an enrolled agent with the Internal Revenue Service and is a licensed insurance agent and broker.

2. He owns various properties and indicates that he has a net worth in excess of $800,000.00.

3. Ascher is not a member of any state bar at the present time. He made an application to take the Georgia bar examination but did not take it because of some question concerning Lewis College at Law.

4. Ascher testified that Addison Legal Services was registered under the Name Statute with himself as business manager and John Darianzo as attorney. Applicant's Exhibit 33, however, shows that as of November 1, 1978, Addison Legal Services was certified as being owned by Walter Ascher with John A. Darianzo transacting business.

5. One telephone service is maintained for Ascher's real estate office, for his accounting office, and the law office occupied by Mr. Darianzo. Darianzo has been associated in the same building with the same telephone number since 1976. John Cunningham and Phillip Wood are attorneys who have been admitted to practice since April 1978. They are presently associated with the Legal Service.

6. Mr. Darianzo testified that up until three months before the hearing the name of Addison Legal Service was nowhere to be found and that prior to that time he practiced under his own name. He said that Cunningham and Wood came in to the Addison Legal Services about the same time.

7. Darianzo said that he did not have any stationery showing Mr. Cunningham or Mr. Wood to be associated with Addison Legal Services. He said that Cunningham has an office building in Aurora and both he and Wood spend their time in Aurora.

8. With reference to the office equipment Mr. Darianzo testified that he owned two of the desks and states that the other two desks as well as the two typewriters and the legal library were owned by Ascher.

9. Applicant's Exhibit No. 1 is a plat of survey of property at Wood Dale. The survey covers a total of twelve acres and is divided into four parcels.

10. In his capacity as a real estate broker Ascher took a listing on Lot 3 from the owners, Mr. and Mrs. Bernacki. In September or October of 1977 Bernackis contracted to sell Lot 3. The purchasers were either Ascher and Kaczmarek or Ascher and Darianzo. The sales price was for $150,000.00 less a real estate commission of $10,000.00.

11. In the closing statement in which Bernacki was the seller of Lot 3 dated April 12, 1978, the purported buyers were W. Ascher and J. Darianzo, the purchase price shown as $150,000.00 and there is a buyers' credit for $10,000.00 real estate commission. With reference to that document Mr. Ascher testified that what it really amounted to was that "We agreed to purchase it at $140,000.00 net". He described we as being himself and Mr. Kaczmarek and he stated that Mr. Darianzo signed for Mr. Kaczmarek but had no personal interest in it. Mr. Ascher testified that if Mr. Bernacki were to ask him for the commission he would give it back to him.

12. During the fall of 1977 Ascher and Kaczmarek were planning to acquire all of the property and to resubdivide it for a manufacturing development, but in January and February of 1978 they reached the conclusion that this project would be too expensive, and they elected to sell.

13. In February of 1978 Sollitt Construction Company entered into a contract for the purchase of Lot 3 for $170,000.00. The closing statement dated in April of 1978 shows John Darianzo as seller although he had no interest in the property. The closing statement shows brokers' commissions to Village Center Realty in the amount of $8,500.00 and to Gladstone Realty in the amount of $6,500.00.

14. With reference to Lot 4, Ascher took a listing from the owners, Mr. and Mrs. Freston, and in September of 1977 Kaczmarek purportedly entered into a contract to purchase Lot 4 from Freston. Apparently towards the end of 1977 it was agreed that Ascher would participate with him as to Lot 4. As between

Freston and Kaczmarek, there were four contract documents, a contract dated September 16, 1977, a rider dated December 16, 1977, a contract dated April 22, 1978, and a rider also dated April 22, 1978. In each document, the signature of Winfried Kaczmarek is a forgery. The actual signers were either Ascher or Darianzo.

15. Among Mr. Ascher's accounting clients were Mr. and Mrs. Bernacki and also Alloy Piping Company. Mr. Thomas Brewer, Sr. is Vice President of Alloy Piping and while picking up his tax return at Ascher's office he learned about the Wood Dale properties.

16. Ascher participated as the broker in the sale of Lot 2 to Brewer, and there was also a contract entered into involving the sale of Lot 4 from Ascher as beneficiary of Bank of Lyons Trust 1737 to Alloy Piping, Inc. at a sales price of $120,000.00. Lot 4 was, however, never owned by Trust 1737.

17. In May of 1978 the closing of Lot 4 between Mr. and Mrs. Freston as Sellers and Mr. and Mrs. Kaczmarek as Purchasers took place. The closing statement indicates the purchase price was $100,000.00, including a purchase money mortgage of $75,000.00. The real estate commission was $10,000.00,

18. Exhibit D to the complaint filed by Alloy Piping is the $75,000.00 mortgage purporting to be signed by Mr. and Mrs. Kaczmarek. Mr. Ascher testified that Mr. Darianzo signed the Kaczmareks' names. Mrs. Ascher notarized the signature.

19. With reference to the transaction between Kaczmarek and Alloy Piping or Brewer, it appears that Ascher's Trust 1737 never had any interest in the property, and when the transaction was closed on July 6, 1978, Ascher presented Brewer with a report of title issued by the Chicago Title Insurance Company in which the First Mortgage in the amount of $75,000.00 had been deleted by the process of covering the disclosure with a piece of paper and photocopying the report of title. The closing statement purports to be

between Mr. and Mrs. Kaczmarek as Sellers and Thomas Brewer, Sr. as Buyer. It states that it was prepared by Walter Ascher and the testimony is that the signatures of Mr. and Mrs. Kaczmarek on the closing statement were in fact signed by Walter Ascher. There is no reference in the closing statement to the $75,000.00 purchase money mortgage, and Brewer did pay the full amount of the purchase price in cash. Ascher testified that at the closing he disclosed the existence of the mortgage to Mr. Brewer and promised that he would remove it. He says that he presented him with a photocopy of the title report so that Mr. Brewer would know what it looked like after the mortgage was paid.

20. In addition to the closing statement, Ascher prepared the affidavit of title and the deed. He signed the names of Winfried and Mildred Kaczmarek to the affidavit. The Notary Public was one Trinity Bianco who works for Ascher in his accounting office. The warranty deed, purporting to bear the signatures of Mr. and Mrs. Kaczmarek was in fact signed by Ascher and notarized by John Darianzo. Darianzo signed Winfried Kaczmarek's name to the Plat Act Affidavit and then acted as Notary Public for the same document.

21. The funds that were made payable at the closing were deposited into Ascher Accounting. Ascher then prepared a settlement between Kaczmarek and himself, and he testified that on or about July 13th he deposited the balance of the funds into John Darianzo's Escrow Account, however, the evidence shows that the actual transfers were by two checks, Exhibits 14 and 15. Exhibit 14 was a check dated July 19, 1978, from Ascher Accounting to Addison Legal Service Escrow Account in the amount of $38,631.00. Exhibit 15 was the check from Ascher Accounting to Addison Legal Services Escrow in the amount of $35,000.00 and was dated October 13, 1978. Mr. Ascher had the right to write checks upon Addison Legal Services Escrow Account when co-signed by Darianzo or the secretary, Donnia Didier, or by Mrs. Ascher.

22. Darianzo testified that at the closing of the sale to Brewer the mortgage was deleted from the title opinion by placing something over that portion of the title opinion and running it through a photocopier. It was his recollection that one of the secretaries did the photocopy. Mr. Ascher told Mr. Brewer that the mortgage would be removed subsequent to the closing date. Mr. Darianzo testified that it was his understanding that the mortgage was going to be placed on another piece of property owned by Ascher.

22. Ascher went to Europe on vacation at the end of July 1978. While he was gone Mr. Brewer indicated that he was extremely upset because he had not received the deed. The first deed was alleged to have been lost in the mail and also was apparently defective. Brewer indicated that he was also upset about the transaction because he had learned about the $75,000.00 mortgage.

23. Darianzo prepared a second deed, signed the Kaczmareks' signature to it and notarized the signatures but did not disclose these facts to Brewer.

24. He tried to excuse his signing the Kaczmareks' signatures to the deed and failing to use his own name or a power of attorney on the basis that he was being badgered by Tom Brewer, Jr. and that it would not have been possible to record the deed without recording a written power of attorney which he did not have. He said that at the time he signed Kaczmareks' signatures they lived in Rockford, Illinois, and that it would have been possible for him to go out there and for the Kaczmareks to sign the $75,000.00 mortgage and note and the deeds instead of his signing their names to them. He said "Sometimes you make a value judgment on the clients you are dealing with."

25. There is a power of attorney purporting to bear the signatures of Mr. and Mrs. Kaczmarek. It is dated November 27, 1977, and notarized April 9, 1979. Ascher testified that he had a verbal power of attorney from Mr. Kaczmarek and later obtained a written power of attorney retroactive to the date when he first got involved.

26. Mr. Kaczmarek testified before the committee that he told John Darianzo to sign his name or to have Mr. Ascher sign his name. He testified Mr. Ascher had a verbal power of attorney from him.

27. John Darianzo testified that he signed Mr. Kaczmarek's and Mr. Kaczmarek's wife's name to documents, a deed, and a trust deed, and that he had Mr. Kaczmarek's verbal authority to do so. He acknowledged that he also signed and notarized the Plat Act Affidavit using the name of Winfried Kaczmarek. He stated that he did so on verbal authorization given him by Mr. Kaczmarek.

28. Darianzo testified that the first time he had any authority for Mr. Kaczmarek to sign his name was in August 1978 and he said that it was sometime after July 6, 1978 that Mr. Brewer, Jr. started to pressure him. He admitted that he had never talked to Mrs. Kaczmarek and he never laid eyes on her or talked to her on the telephone. He then admitted that he signed the names of Mr. and Mrs. Kaczmarek to the mortgage papers on May 22, 1978.

29. Darianzo said that it was his feeling that with a power of attorney it would be proper to sign an affidavit of title for someone.

30. Ascher was advised by Freston that they were concerned because they had been advised by Mr. Brewer that he had purchased their property. Freston said that he didn't want anything except for the mortgage to be paid off. The mortgage was paid off on January 12, 1979. Ascher testified that Freston did not want to receive his money until 1979.

31. Thomas Brewer, Sr. testified against the applicant. He signed the complaint filed by Alloy against Mr. Ascher and testified that all the statements in the complaint are true. He denies that anything was said to him about a mortgage against Lot 4 at the closing, and his first information was when he heard about it from the Bank of Elk Grove on July 28th. He was given a copy of the title commitment, but there was nothing on it about

a mortgage, and the title commitment was not changed in his presence. He testified that the closing on July 6th or July 7th took 15 minutes to one-half hour and that it was handled exclusively by Mr. Ascher. Brewer testified that it was his assumption that Ascher was a lawyer and for that reason he did not hire a lawyer to represent himself or Alloy. He considered Ascher a friend and was relying on that friendship.

32. In the litigation filed by Alloy, the answer is signed by Phil Wood with the initials (WA). Mr. Ascher testified that he signed the name Phil Wood. Mr. Ascher testified that he and Mr. Wood went over the complaint in preparation for filing the answer, but they did not have enough time to have the answer typed up. Mr. Wood was in court and Mr. Ascher called on the telephone and read the answer to him, and Mr. Wood said, "See if you can get it filed", and Mr. Ascher took it to the court house in Wheaton and filed the answer.

33. Ascher testified that when he filled out the questionnaire in February of 1979 to the effect that there were no changes with respect to lawsuits since his original application that he thought he had already furnished the information in questionnaires furnished with the July 1978 bar exam or at the time of his application in November of 1978 to write the February 1979 bar exam.

34. June Bernacki testified that she had no complaints about the way Mr. Ascher handled any work that he did for her and her ex-husband.

35. Attorney Bruce Heidecke testified over the objection of the applicant. Mr. Heidecke was the Attorney for the Frestons and testified to his conversation with Mr. Brewer when Brewer discovered the existence of the mortgage. Mr. Heidecke testified as to discrepancies between Ascher's testimany on a discovery deposition in the Alloy Piping case and his own recollection of the same facts, and he also testified that Ascher had acted as his attorney in a real estate closing in behalf of a family named Garza.

His testimony was challenged factually by Ascher, and the committee does not deem the finding of facts with reference to Mr. Heidecke's testimony necessary for its determination in this matter.

CONCLUSIONS

It is the opinion of the committee, after hearing all of the evidence, and after examining all of the exhibits, that the conduct of Mr. Ascher is inexcusable in the following respects:

1. The nature of the charges in the Alloy Piping litigation are such that Mr. Ascher must have known that the charges would seriously reflect upon his character. The committee cannot accept the suggestion that it was his best recollection that he had disclosed the lawsuit in prior documents.

2. The representation of Trust Number 1737 as a Seller, when, in fact, the Trust had no ownership, was improper.

3. Ascher's conduct in signing the Kaczmareks' signatures to various documents and in knowingly allowing Darianzo to sign the Kaczmareks' signatures in the dealings with the Frestons was improper. The Frestons were given unenforceable contracts, and they were given an invalid and unenforceable note and mortgage, and the fee title to their property was taken from them for over six (6) months without payment of the balance of the purchase price and without any enforceable documentation to protect them.

4. Similarly, Ascher's conduct with respect to Alloy Piping was improper. Again, he and Darianzo signed the Kaczmareks' names to important documents, they delivered defective title to Alloy, and the purchase price was kept in accounts subject to the control of the Aschers for six (6) months.

5. The procedures followed, particularly with respect to the Freston and Alloy deals, are unconscionable and indicate to the committee a serious defect in the character of the applicant, rendering him unfit to practice law in Illinois.

6. The committee believes that the procedures followed with respect to the "Addison Legal Service" was simply a subterfuge to permit Ascher to practice law without a license. This is a further reason for denying a license to Mr. Ascher.

It is the understanding of the committee that the burden is on the applicant to prove that he has the proper character and fitness to be admitted to practice law in Illinois. However, in reaching the decision in this case, the committee finds that the evidence is overwhelming against Ascher.

Taking all of the evidence heard by the committee, it is the opinion of the committee that the preponderance of the evidence is clearly against the applicant.

It is further the opinion of the committee that the information contained in this proceeding with reference to the conduct of Attorney John Darianzo should be made known to the Attorneys Registration and Disciplinary Commission, and the secretary of the Board of Law Examiners is hereby requested to relay this information to the Commission.

This opinion has been circulated among the members of the committee, and they have indicated to the Chariman that they are in favor of the decision and approve the opinion by a vote of 6 to 0. Any concurring or dissenting opinions will be furnished herewith.

Respectfully submitted,

_____

Chairman

Office-Supreme Court, U.S.
FILED
FEB 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ASCHER,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Walter Ascher,

Petitioner,

vs.

State of Illinois,

Respondent.

R E P L Y B R I E F

The Petitioner, Walter A. Ascher, in reply to the Respondent's answer, says:

I

PROCEDURE

A State Court of last resort which relies upon the thinnest veneer of procedural irregularity, (R. Br. 7-8) in the teeth of a charge of denial of due process, can be considered more inclined to deny that process. At least its reliance on that veneer is prima facie evidence of its self doubt.

In any event, the irregularity does not exist. The Respondent says:

1. Petitioner violated subsection 1(f) of this Court's rule 21 by failing to set out "verbatim" the state court rules "which the case involves". (R. Br. 7) These are Illinois Supreme Court Rules 704, 708 and 709, plus two state statutes. (id.)

This case does not "involve" those rules and laws. The resolution of this issue is not concerned

with those rules. They provide for a due process hearing. It was the chairman who converted this adversary procedure into an "inquiry". (unilateral investigation) by his ukase, at trial, denying cross examination. (R. 358) Neither statute referred to has relevance to the due process issue. Thus, they are not "involved" in the context as used in Subsection 1(f), since it is not necessary to construe them in the disposition of this issue. They are involved only to the extent that the Respondent has injected them for its procedural ploy.

2. Nor is subsection 1(k) (ii) involved. (R. Br. 8) The Report of the Character and Fitness Committee to the Respondent Court is not one of the documents enumerated in that rule. The Respondent's Brief calls it a "decision". (R. Br. 1 a) The Court calls it, "a report with Findings and Conclusions". (R. 708(c), 73 Ill 2d). Nor is that report rendered by a court or an administrative

agency, as the rule requires. The Committee is an arm of the Court, which reports directly to the Court. (Rule 708) This report is "advisory". It has no binding effect whatever. (In re Mitan, 75 Ill 2d 118)

> "This court has the inherent power to regulate the admission of attorneys to the practice of law and to discipline attorneys who have been admitted to practice before it. . . . . This court has held that because of the nature of the proceedings before those to whom we have delegated the authority to act, we will not consider technical objections as to the practice and procedures before them, nor can such technical objections bind us or limit our authority to act. In re Czachorski; In re Yablunky (1950), 407 Ill. 111. (id., at 123-24)"

The denial of due process came from the Court solely and exclusively by order and opinion. (81 Ill 2d 473)

The distortion in supplying the report in its brief. (R. Br. 1a-11a) which is the head,

without the body, is dramatized by that act. It included the Report of the Committee, without the transacript and exhibits, which accompanied that Report to the Court. The report not only has no legal effect, but it is the springboard for the plea of denial of due process here. It is the gravamen of the Petition, because it is not based upon the evidence and the exhibits, which deny its Findings and Conclusions.

This Court should reject the ploy and look to the merits of the Petition.

II

DENIAL OF DUE PROCESS

The Petitioner raised the issue of due process in the Court below. (P. Memo pp. 11-12) In its answering brief, respondent argued that, "Ascher was not denied due process." (R. Br. 57-58) The issue Respondent raises here, is, whether a denial due process was argued in the Court below.

It was. (id.)

Respondent argues that "the hearing was complete, the procedure acquiesced in without objections, and confrontation and cross examination was supplied by having all questions desired to be put to the two adverse witnesses at the request of the Applicant asked by the Committee." (Emphasis added; R. B. 9-10) The question of the restriction to cross examine Brewer didn't arise until the last hour of the day. (R. 358) Then, Petitioner found that our opportunity to test Brewer's credibility was gone. (P. 358) In re Oliver, stresses that right of confrontation, including cross examination. 333 US 257, 273. Nor is confrontation accorded by proxy. (See, R. 358-361) for the full measure of that futility. Meaningful cross examination of Brewer could have forced an admission of his meaning of the words "clear title".

III

DUE PROCESS RELEVANT TO ADMISSION

This Court argues that the denial of due process is immaterial in admission cases. (R. Br. 15-17) It calls the character and fitness requirement, "unique". (R. Br. 15) Denial of moral character, it quotes, is a metaphysical concept. In Justice Franfurter's words the test of it is ". . .an intuition of experience which outruns analysis. . ." (R. Br. 16) That quotation of the Justice is from his concurring opinion in Schware. (353 US at 248) In that case, this Court held that: "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." (id., 353 US at 246-47), That is all that Ascher urges here.

IV

A. THE UNFOUNDED COMPLAINT.

The Respondent, in claiming evidentiary support for its Findings relies upon a complaint filed in Du Page County, in 1978. (R. Br. 20) The Committee knew that the fraud (chancery) part of that complaint had failed, when this Petitioner notified it that the case had been transferred in his motion, to the law calendar. The unfounded and factually unsupported claim of "wilfully, wantonly, fraudulently and maliciously", (See, P. Br. 10-11) are allegations in a complaint that has not as yet been brought to trial. No one should be deprived of his good reputation and his profession by allegations in a complaint. The Respondent has nothing else. (R. Br. 18-20)

B. A FEDERAL QUESTION PERSISTS.

This Petitioner is here because he has been denied due process by a denial of admission to the Illinois Bar by that state's highest court. The denial is based upon lack of character and fitness. The Petitioner proved, beyond the context of the charge,

his character and fitness. The Court had no evidence to the contrary.

Thus, little credence can be given to the court's cry that the denial of that right, is not a Federal question. (R. Br. 18) These aberrations in the Respondent's brief are all persuasive that due process was denied. For if, as petitioner pleads, he was denied a license to practice, for lack of character and fitness, without proof that he committed an immoral or illegal act, he is denied due process of law. Without citation in this court, that is a Federal question.

C. FORGERY

The Respondent belatedly here, attempts to argue immorality in fraud, and illegality in forgery. (R. Br. 2, 19, 22) The signatures signed by Petitioner were the Kaczmareks'. Mr. Kaczmarek testified for the Petitioner and was unequivocal that he had written and oral authority to sign their names at all times.

(R. 262) Moreover, the fraud of the unfounded complaint was to recover the difference in sales price between what Kaczmarek paid Freston and Brewer paid Kaczmarek. The "fraud" intended by the "forgery" statute (Ill. Rev. Stat. 1979 Ch. 38, Par. 13 (1) (a)) refers to the deed of conveyance, which Brewer has never disputed, and which is still his source of title. "No question of fraud was raised in the hearing, no finding of fraud was made." (P. Mem. p. 20) The Respondent's desperate reach for immorality or for illegality, on that basis, fails completely.

D. PETITIONER WAS NOT EMPLOYED BY ADDISON LEGAL SERVICES, AND HIS ANSWER WAS TRUE.

Counsel for the Committee during oral arguments cited two alleged additional misrepresentations Petitioner made on the questionaire. One, that the Petitioner failed to disclose that he had ever worked in a law office or had been employed by a lawyer. Petitioner has stated and the record shows that

Petitioner was never on a payroll, shared any profits or worked in a law office, and that he merely provided accounting functions for the office.

Petitioner answered "NO" to the question whether he had ever been "accused by any employer, superior, associate, customer or other person of dishonesty in connection with any employment or occupation". Here again counsel for the Committee tries to impute a wrong to petitioner by imputing an employment relationship in an arms length Real Estate transaction.

CONCLUSION

The Petitioner has committed no wrong of any kind. The Respondent uses the unsupported conclusion of "inexcusable" to cover that void, based solely upon the allegation of a civil complaint, over two years old. This Court should grant its Writ to review this unwarranted punishment.

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